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ABSTRACT

This legal anthology presents contemporary thoughts covering a broad range of topics in education and school safety from a national perspective. It covers four major areas: (1) an overview of schools in U.S. society from historical and legal perspectives; (2) an exploration of some aspects of school crime; (3) restitution, parental liability, Article I, Section 28(c) of the California Constitution, the "safe schools" provision, and law-related education as potential aids in improving school climate; and (4) the legal profession's role in education. James Rapp sketches U.S. educational history from colonial times to the present and discusses education law as a specialty area of practice. Patricia Lines and Judith Bray trace the legal definition of "school" from early cases to modern times. Joan McDermott provides a sociological study of the interrelationships among offenders, victims, and fearful youths in schools. M. Chester Nolte discusses disciplinary procedures and the increasingly criminal nature of student infractions. B. Glen Epley shows how courts have handled questions of school boards' decisions regarding student discipline. Jeri Goldman discusses the legal conditions surrounding student/parent restitution for damages by the student to school property. Dana Prescott and Cynthia Kundin analyze common law restrictions on financial recovery by a victim from the offender's parents. Kimberly Sawyer discusses the adoption of the "safe schools" provision in the California Constitution. Finally, James Rapp takes a practical, pragmatic look at education law as a speciality area of practice and George Nicholson and others encourage involvement and provide model programs for lawyers to participate in the educational process and help promote safer, more effective schools. (GEA)

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in partnership with the U.S. Department of Justice,
U.S. Department of Education and Pepperdine University,
present this unique compilation of articles
on legal issues pertinent to school safety.

SCHOOL SAFETY LEGAL ANTHOLOGY

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Foreword

The National School Safety Center, under the skillful direction of George Nicholson, has performed a unique and useful service to the people of the nation in the preparation and distribution of the School Safety Legal Anthology.

There were times within our memory when it would have been unthinkable to be concerned with school safety. Mutual respect between children and teachers was the norm. Violence was a rare aberration. The schooling process revolved solely around the educating of young people for future constructive citizenship.

Unfortunately we now live in troublesome, indeed hazardous, times. A decade or two ago at worst the potential delinquent pupil was merely truant, perhaps smoked cigarettes, and drove a hot rod car. Today the delinquent of the same age may be violent, use drugs and be armed with deadly weapons.

It might be fruitful to ascertain the causes of this downward spiral in juvenile morality. One could point the finger at parents, at vulgarity and brutality in television and motion pictures, and in general at our permissive and affluent society. But assessing blame is not our immediate concern. What we must do – and what the National School Safety Center is constructively undertaking – is to prevent further deterioration in the environment of our schools, to elevate standards of conduct, and to do our utmost to enhance the quality of future generations of American citizens. That, is priority number one.

In the final analysis, the primary duty of school officials and teachers is the education and training of young people. The state has a compelling interest in assuring that the schools meet this responsibility. But that cannot be accomplished unless, first of all, discipline and order are maintained so that teachers, in a reflective rather than a hostile atmosphere, can begin to educate their students.

In addition to providing education, the school has the obligation to protect all its pupils from mistreatment and contamination by the juveniles who are troublemakers, and also to protect teachers from violence by the incorrigibles whose conduct in recent years has prompted national concern.

If we are not to have countless future generations of adult criminals, we must make as certain as possible that we do not permit criminality to begin with juveniles in schools. We do not have police officers in our classrooms.

We do not have parents in our classrooms. Therefore we must give to teachers and principals all the tools they reasonably need to preserve order in classrooms and school grounds.

To be helpful in this task is the function of this thoughtful, provocative anthology, for which the National School Safety Center is to be commended. The anthology will equip school administrators, principals and teachers with knowledge they can use in the performance of their duties. More importantly, it will impart information regarding the dimension of the problem, and suggested solutions, to the public. That means all of us – in education, academia, government, industry, or as ordinary taxpayers. For we all have a vital stake in a safe school environment.

Justice Stanley Mosk
Supreme Court of California

Stanley Mosk has been a justice of the California Supreme Court since 1964. Prior to that he served six years as attorney general of California.

Introduction

The education of our nation's youth is important to all Americans. Our society has always been proud of its commitment to provide good educational opportunities for all youth. Yet today, due to crime, violence and the breakdown of discipline on and about many school campuses, it is difficult for countless students to study and learn and for educators and other staff to work. The school climate in many of our nation's places of learning is not tranquil, but menacing.

Statistics, although ominous, are inadequate to convey the magnitude of school safety problems in America. Suffice it to say, they are now so pervasive as to require the sustained personal attention of the President, the Attorney General, and the Secretary of Education of the United States.

The President put the problem in its proper perspective while recently speaking to a large gathering of secondary school principals. "As long as one teacher is assaulted, one classroom disrupted, or one student is attacked, then I must and will speak out to give you the support you need to enforce discipline in our schools," the President declared. "I can't say it too forcefully," he concluded, "to get learning back into our schools, we must get crime and violence out."

The problems on school campuses do not stop at the schoolhouse gate, but spill over into the community. Because of this ripple effect, it is important for judges, lawyers, law professors, bar and judicial association leaders, legislators, educators, law enforcers and others to become aware of the full scope of the problem and work together to seek viable solutions which return our schools to their proper roles as peaceful and productive places of learning.

This legal anthology presents contemporary thoughts covering a broad range of topics in education and school safety from a national perspective. It covers four major areas: (1) an overview of schools in American society from historical and legal perspectives; (2) an exploration of some aspects of school crime; (3) restitution, parental liability, Article I, Section 28(c) of the California Constitution, the "safe schools" provision, and law-related education as potential aids in improving school climate; and (4) the legal profession's role in education.

An overview of education in the United States is presented in two very

recent articles. James A. Rapp's "Overview of American education" gives the reader a brief sketch of the history of education in the United States from its earliest beginnings in colonial times to the form in which we presently know it. Patricia Lines and Judith L. Bray's "What is a school?" traces the legal definitions of "school" from early cases to modern times.

The section on school crime spotlights three articles. Joan McDermott's "Crime in the school and in the community" provides a sociological study of the interrelationships among offenders, victims and fearful youths in schools. The article reports that the same youth may occupy all three categories at once and explores how crime and fear of crime in schools and their surrounding communities are interrelated.

M. Chester Nolte's "Freeze! How school employees react to student violence" discusses disciplinary procedures and actions by school officials which have been upheld or struck down by the courts and examines the increasingly criminal nature of student infractions and their effects on school officials.

B. Glen Epley's "Substantive due process in student discipline: The judicial role" shows how courts have handled questions of school boards' decisions regarding student discipline. It explores cases in which courts have overruled school board decisions, as well as cases where courts have sustained the authority of school boards.

The section on potential remedies calls attention to four pertinent articles. Jeri J. Goldman's "Restitution for damages to public school property" discusses the legal conditions by which a student and his parents may be required to make restitution for damages by the student to public school property.

Dana E. Prescott and Cynthia L. Kundin's "Toward a model parental liability act" analyzes common law restrictions on the financial recovery by a victim against the parent of a juvenile who has harmed him. It also presents a model act, arguably within constitutional standards, which can be adopted by states to make parents liable for the torts of their children.

Kimberly A. Sawyer's "The right to safe schools" relates the history leading to adoption of the "safe schools" provision in the California Constitution. The article interprets the provision and analyzes its enforceability, discussing such factors as the affirmative, constitutional duty to make schools safe, and civil damages as a remedy for violation of the constitutional provision's terms.

The final section concerns the attorney's role in education. James A. Rapp's "Education, law and the attorney" is a very practical, pragmatic look at education law as a specialty area of practice. It includes a checklist of services commonly provided by school attorneys, as well as discussions of the patterns of legal representation in this area, and the attorney school-related client relationship.

The last article, "School safety and the legal community," prepared by the Center, encourages both involvement and provides model programs for lawyers

to participate in the educational process and help promote safer, more effective schools.

The essential purpose of this legal anthology is to help judges, lawyers, law professors, other legal professionals, bar and judicial associations, and legislators become aware of an area of law which is growing in significance and having a far-reaching impact on society. We hope this publication will motivate, even energize the reader, both lay and legal, to learn more about school safety issues and encourage active participation in the national effort to improve school climates throughout America.

The National School Safety Center is vitally involved in this effort. Its mission is to coalesce public, private and academic resources throughout America and provide a central headquarters to assist school boards, educators, law enforcers, judges, lawyers, law professors, other legal professionals, bar and judicial associations, and the public to restore our schools to their former status as safe, secure and peaceful places of learning.

The Center's legal staff deals with school safety and delinquency prevention, vicarious civil liability, criminal and administrative law rules and procedures in federal, state and local jurisdictions. Through modern computer resources and advanced marketing and communications technologies, the Center's legal staff encourages judges, lawyers, law professors and other legal professionals, bar and judicial associations, other legal groups and legislators to become systematically and comprehensively involved with school safety. This anthology is one effort in that direction.

SECTION ONE

Education in the U.S.

10 ***Overview of American education***
James A. Rapp

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Patricia Lines and Judith L. Bray

In order to understand the current status of America's schools, we must be aware of their history and roots. It is important to have in mind how our educational system began in colonial times and at the birth of our country, and how it has developed and changed in the two centuries since.

The many influences and forces which have left their mark on our schools and the way they function are worth a thoughtful review. This section seeks to provide the reader with some background information in order to clarify how our schools have reached the positions they currently occupy.

Overview of American education

James A. Rapp

Unlike the American system of government which was clearly defined in the United States Constitution, the American system of education has not operated according to defined parameters. The founding fathers, in drafting the Constitution, clearly envisioned and defined a system of government with three discernible branches, identified their roles, responsibilities, and powers, and articulated the inherent rights and freedoms common to all Americans. No such careful delineation occurred with respect to the American educational system. Instead, American education was and today remains an eclectic product of the diversity of the people and the evolving role that education must play.

One trait that is certainly typical of the American approach to education is its uniquely American nature. It is a system whose role, parameters, and law were undefined at the outset and evolved over three centuries. This evolutionary nature perhaps best characterizes the American system and law of education.

Education and the colonies: Pre-1783

Introduction

Prior to 1783, one of the most dominant characteristics of the education provided throughout the colonies was its regional nature. The New England colonies, led chiefly by Massachusetts, initiated a localized though significant effort to educate the young. A more modest attempt was made in the colonies of Pennsylvania, New Jersey, and Delaware. In the Southern colonies of Virginia, the Carolinas, and Georgia, there were significantly less developments in promoting public or private education. Throughout all of the colonies, and in spite of the progress that was made with the establishment

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of some town schools, no formal system of education was in effect prior to 1783; the matter of education was largely private as well as church supported and controlled.

At this time there was virtually no law of education. Educational institutions were run typically without interference. However, this period was also characterized by a demand, by law if necessary, requiring the colonial population to receive a basic education. No doubt, popular education played an important role in the American Revolution.

The New England colonies

The New England colonies, perhaps because the population of the new land settled chiefly in colonies such as Massachusetts during the "Great Migration" of 1630, were the first to recognize the need for some type of public education in the colonies. In the mid-thirties, several towns within Massachusetts began to experiment with some form of education for the young. Not surprisingly, the schools that would later be established reflected the same emphasis upon religion, for example, Puritanism and Calvinism, as did the schools of Europe emphasize Protestantism and Catholicism. The development of the first formal school in the colonies probably came with the establishment of the Boston Latin School in 1635.[1] That year, a number of Boston's citizens contributed their funds to engage and maintain a schoolmaster for the new school.

The Boston Latin School was patterned after the European classical schools.[2] Subjects taught to students included not only reading and writing, but ancient languages and literature as well. By the time a youngster was eight, he was expected to have mastered the fundamentals of English grammar; subsequently, he would proceed to learn and read Latin and still later Greek. Enrollment of the school averaged one hundred pupils per year. As late as 1767, the school had an enrollment of 147, and between 1744 and the Revolutionary War the school never had fewer than one hundred students.[3] The Boston Latin School was at the outset and probably remained throughout the colonial era the largest school of its kind in the colonies. American immortals such as Benjamin Franklin, Samuel Adams, John Hancock, and Robert Treat Payne studied at the school. Much later, the list of graduates would include such notables as Ralph Waldo Emerson, Henry Ward Beecher, and George Santayana.[4] Shortly after the establishment of the school, other similar schools appeared. The historic town of Charlestown, for example, established the first town-supported school – a Latin grammar school – in 1636. Three years later Dorchester became the first community to make provision for a permanent town school.

The efforts made to establish town schools suggest that there seemed to be no clearly envisioned plan of action to provide for the establishment of schooling; essentially a local effort was used to provide for all schools. Even so, there was evidently a concern with the importance of education that at least extended throughout Massachusetts, for in 1636 the Massachusetts General

Court appropriated 400 pounds toward the establishment of a school or college. Two years later Massachusetts resident John Harvard died and left his personal library to the school or college for which the money earlier had been appropriated; later Harvard College was named in honor of its first donor. Harvard College, later renamed Harvard University, emphasized the college subjects typically taught in the European universities, such as Aristotelian philosophy, rhetoric, literature, and the ancient languages. Bachelor and master of arts degrees were offered by the institution, whose purpose was largely to train youth for the assumption of prominent positions as members of colonial society. The first college in the new colonies was not an especially popular institution. Its tendency was toward exclusiveness, with tuition beyond the means of most New England-ers.[5] During the first sixty years of its existence, Harvard College remained the sole college in the colonies, and the average number of graduates for each of those sixty years was only eight.[6]

Shortly after Harvard College was established, the Commonwealth itself undertook an action that was to have considerable educational and historical significance. In 1642, the Commonwealth of Massachusetts ordered that parents and masters of apprentices see to it that the young were taught reading, religion, and the colony's principal laws. Perhaps because in the Puritan colony church and state were regarded as one, the lawmakers of the Commonwealth felt that the sooner the young learned of the laws and conventions of society, the greater the benefit for the new colony. Education was regarded as a necessity in the Puritan scheme; it was necessary for Bible reading as well as for the maintenance of the church and state.[7] To the Puritans, as well as other denominations of the largely Protestant population of the new colonies, religious truth was not to be comprehended fully unless one read the Scriptures. The Puritans wanted to read, and they wanted their children to read.[8]

In any case, the act was significant because it represented the first instance where a colonial governmental body attempted to legislate the provision of education. Although there is not a record of any parent or master craftsman being punished for failure to abide by the law, there was a fine that was to be imposed in order to assure that children of the Massachusetts Bay Colony be taught to understand the principles of religion and the fundamental laws governing the new land.[9] Originally, only boys were expected to receive instruction, although the schools were soon opened to young women as well.

Five years later in 1647, the General Court of Massachusetts passed a stricter law that ordered all townships having a population of fifty households to commission for pay a person or persons to provide instruction in reading and writing. Townships comprised of one hundred or more households additionally were to provide education in the subjects of Latin and grammar. Other New England colonies soon followed the example of Massachusetts in its passage of the "Old Deluder Satan Act."[10] In actuality, the act was not always well received by residents of the colony. To poor settlers, the law seemed not

only harsh but was burdensome; labor was scarce in the new land, and fathers badly needed sons for the routine labor that had to be performed.[11] Still, for all of its controversy, the law was the first of its kind in the colonies, and in spite of disapproval by some it was widely adapted. By 1671, all of New England except Rhode Island had adopted some form of compulsory education. The result of the emphasis on reading and writing within the New England colonies was a literacy rate estimated eventually to exceed that of England. The literacy rate of England, estimated at fifty percent in the mid-1600's, was very shortly bettered in the new colonies. In the New England colonies, from all accounts, the literacy rate improved rapidly throughout the seventeenth and eighteenth centuries when a vast majority of adult males could read and write.[12]

Most significant about the Massachusetts law of 1647 was the establishment of the principle of public support of education. Essentially, the law foreshadowed what remains today the practice of community support for and administration of the schools. Even in the mid-1600's, New England towns levied and raised taxes for education, paid teachers and supported schools from the revenues received through taxation. Typically, a school was governed by a group of local citizens that came to be known as the board of education. Moreover, the notions of the state's mandating the provision of education and raising the revenues necessary to support the schools are fundamental assumptions that remain as foundations to our present educational system.

The Middle colonies

Whereas the effort to establish some form of localized educational system was quite evident throughout the New England colonies, in the Middle colonies of Pennsylvania, New Netherland, New Jersey, and Delaware, formal education developed more slowly. Perhaps this difficulty of the Middle colonies to implement some form of private or public education prior to the Revolutionary War can be traced to the diversity and heterogeneity of religious beliefs of the Middle colonists as opposed to a lack of commitment with regard to the importance of a formal education. In the New England colonies, Puritanism reigned supreme. Thus, any efforts of the New Englanders to establish town schools reflected only one dominant thread of religious thought.

The Middle colonies, however, had no direct ties with Puritanism and represented more of a "melting pot" where matters of religion were concerned. The residents of Pennsylvania, New Netherland, New Jersey, and Delaware were Protestant as well as Catholic. Among the Protestant population were a number of denominations with widely divergent religious views, *e.g.*, the Quakers, Dutch Reform, Lutheran, Mennonite, and Presbyterian as well as others. Because of this diversity, there seemed to be no single philosophy or religious perspective that would dominate and give rise to the creation of town schools on the same scale as in New England. Further, unlike the residents of the New England colonies, the settlers of the Middle colonies came from a

variety of lands; thus, there was not even the tie of a common language.

Like the New England colonies, several of the Middle colonies prior to 1783 attempted to implement church supported private as well as public schools. In fact, parish or parochial schools, each offering instruction according to its own denominational learning, remained the dominant schools in the Middle colonies until after the Revolutionary War. A modest effort was made in New Netherland, through the Dutch Reform Church, to maintain some town schools in the middle of the seventeenth century, but this effort ceased when the British seized New Netherland in 1664 and renamed the colony New York. Likewise, when Pennsylvania in 1683 passed an ordinance that mandated the erection of public schools and the provision of education for all youngsters, the law was subject to such outspoken criticism among Quakers that the colony yielded and instead encouraged the establishment of parochial schools in 1701.[13]

In terms of a contribution to what was later to become an American system of education, the establishment of some town schools in the Middle colonies is perhaps less significant than two other developments that occurred: the founding of several colleges prior to 1783; and the emphasis on private academies of a vocational nature. Although there was little measurable support among lawmakers for the establishment of colleges in the Middle colonies during the seventeenth century, by the middle of the next century several colleges were founded. The College of New Jersey, later to become Princeton, was established in 1746; King's College, later renamed Columbia, was founded in 1754; the College of Philadelphia, which later became the University of Pennsylvania, was established in 1755; and Queen's College, known later as Rutgers, was founded in 1766. All of these institutions, like Harvard College that had been established over one hundred years earlier, emphasized the traditional studies common at the typical European university; ancient languages and literature were given the most treatment, as was preparation for the ministry.

One of the most significant educational developments in the Middle colonies, however, took place in the mid-1700's with the founding of several academies, principally in and around the city of Philadelphia. Unlike the ancient Greek academies were the liberal arts of the *trivium* and *quadrivium* were stressed,[14] these new institutions were private schools that purported to specialize in the more practical, vocational-oriented subjects as well as general education. By 1700 many of the larger towns in the Middle colonies had become major centers where goods and services were traded. Further, in these towns there was a need for those who had not only the rudiments of a liberal education but who also could keep accurate figures for business or who might apply the elements of mathematics to navigation and surveying. Most of these numerous institutions were private, supported solely by fees, and admitted anyone who was willing and able to afford the tuition, women as well as men.[15] Typically, subjects taught included bookkeeping, navigation, surveying, as well as some elementary consideration of the principles of engineering.

The Southern colonies

Unlike the residents of the New England and Middle colonies, many of whom fled to the new land to escape persecution and enjoy religious freedom, the residents of the Southern colonies were a more conservative lot. Generally they had come to America not in search of religious freedom, but in order to better their personal condition, particularly where financial matters and wealth were concerned. With the exception of a large Catholic population that settled in Maryland in the middle of the seventeenth century, most of the Southern colonists were overwhelmingly Protestant. Unlike their counterparts in the north, who came from a variety of religious denominations and backgrounds, the residents of the Southern colonies were largely Anglican in their religious convictions. Indeed, by the early part of the eighteenth century, the Anglican Church had been firmly established in all five Southern colonies. Although there were some clear differences between the convictions and practices of the Southern Anglicans and the Church of England, the outlook of most Southerners was thoroughly British, at least by comparison with the residents of the other colonies.

In education, moreover, the English outlook was predominant in the Southern colonies.[16] It was not the right of every child to an education, according to such a review, but was a privilege that generally was within the grasp of only the wealthy and favored classes. Education, according to the English view, was not the business of the state but of the individual. Accordingly the education of youngsters in the Southern colonies consisted mainly of the efforts provided by parents and the churches. Generally, only the well-to-do were entrusted to the care of the private schools and tutors, while the colonial lawmakers themselves avoided anything representing an active role in the provision of education.

Soon, however, the pressure of American conditions necessitated some changes in what previously could be characterized nearly as a *laissez faire* approach to education.[17] The growing numbers of poor settlers, which accounted for over half the population of the Southern colonies, required that some form of apprentice training be provided for children from the underprivileged classes.

Very little actual legislation was passed in the Southern colonies for the provision of education. In 1642, Virginia enacted a type of "poor law" whereby relief would be provided for the poor to educate their children; some twenty years later Maryland passed a similar law, as did the Carolinas and Georgians. The Virginia law created a workhouse school at James City to which each county was to send two children. In such a setting the youth were to be given training in a trade in order that they might later become employable. With the exception of these "poor laws," however, there were no formalized attempts in the Southern colonies to support either public or private education at the elementary or secondary levels.

Even though Southerners seemed to accomplish little in providing education

for the masses, it is ironic that in the South the first support for a college or university in the new land was realized. In 1619, the Virginia Company reserved several thousand acres of land and gave a sum of money toward the founding of a college or university at Henrico. Unfortunately, this was a dream of early Virginians that was not to materialize until another seventy years had elapsed; in 1620 a group of Indians, irate with the efforts of local Christians to impose their standards upon the Indian population around Henrico, nearly massacred the entire population in and near Henrico City. In spite of this setback, the residents of Virginia finally obtained a college in 1693, when William and Mary College, later renamed the College of William and Mary, was formed in honor of its chief sponsors. The college was chartered for the purpose of extending liberal arts and the Christian faith to its students. In addition, the Virginia college stressed preparing young men to assume the pulpits of the Anglican church.

Summary

Perhaps the one characteristic that best summarizes the educational climate that existed in the American colonies prior to 1783 is the regional nature of public and private education that was available. Although in some of the New England colonies considerable progress was made to suggest a commitment of the colonists to public and private support of education, it was not until after the new nation had been legitimately formed that the role of education in the American scheme was to become more clearly defined.

Education in the new nation

Introduction

During the years immediately following the Revolutionary War, Americans were concerned with the struggle for a sense of identity. Whereas in the pre-Revolutionary War years the church ultimately had played the major role in providing a sense of mission and direction for the thirteen colonies, after independence the nation itself became the guiding force for the states. Americans were faced with the task of creating a unified nation, and this task was partially completed with the formulation of the Constitution in 1787. One of the most important functions of the Constitution was its delineation of what freedoms and rights rested with the individual, what responsibilities and powers were entrusted to the states, and what the role, responsibilities, and powers of the federal government were to be. Similarly, the years following ratification of the Constitution reveal a gradual effort to define the private, state, and federal roles with respect to the provision of education in the new nation. Whereas in the years before the Revolutionary War American education was characterized by regional efforts to educate, the period from 1784 through the end of the nineteenth century is perhaps best characterized by the attempt to formulate a

systematic approach to the provision of education at all levels. This effort was accompanied by a greater involvement of the law in education.[18]

The years following independence

Shortly after independence, the education that was administered throughout the United States was extremely diverse in nature. In the northern states such as Massachusetts, public education was popularly supported. New York in 1784 organized a school system and in 1812 appointed a state superintendent of education.[19] In Pennsylvania, while there were some publicly supported schools, most schools were either philanthropic or denominational. In the South, there was no state provision for education; as was the case before independence, most education was privately supported.

The federal government played less of a role in the provision of education in the states than in the territory soon to become a part of the union. It was only west of the Alleghenies that any provision for education was specified by the federal government. Under the Articles of Confederation, the Ordinance of 1787 set aside one plot of land for a school in every township. It was on that basis in 1862 that the Morrill Act gave every state that had established a publicly supported agriculture college thirty thousand acres of federal land for each of its legislators in the Congress. Since the time of passage of the Morrill Act, over twelve million acres of federal land have been turned over to the states. Over seventy land-grant colleges now operate on these lands.

The first quarter of the nineteenth century witnessed a transformation in the new nation.[20] The population increased measurably; the number of states increased substantially. The cities were growing rapidly in population and in number. The impact of technology, with the coming of the railroad and the steamboat, was beginning to be felt. Likewise, this period in American history saw the gradual rise in the prominence of the common man who not only had been given the right to vote but exercised that right freely. By 1820, thirteen of the twenty-three states had in existence constitutional provisions and seventeen had statutory provisions pertaining to public education.

The common school concept

It was against this background of growth and optimism that one of the most significant developments in American education occurred: the rise of the common school. Few schools were actually supported by the public in 1825, and those which were generally were not highly regarded; private education, for most Americans, was still held in higher esteem. A few states had established local taxes for the purpose of supporting public schools, while other states received their school revenue from grants of land. But as the nation passed through its transformation in the first quarter of the nineteenth century, the perceptions about the provision of public education began to change. In a country that was experiencing rapid growth and change, and where every white

male could not only vote for every office-holder but could also even actively seek office, there came a gradual recognition of the need for an educated populace in the new democracy. More frequently than before, many were arguing for a school system that would educate youngsters for direct participation in democratic affairs. Private education alone was gradually regarded as insufficient. The type of schooling that was necessary, many claimed, must be free and open to all, and it would have to be supported through public revenues. Such were the beginnings of the "common" or public elementary school concept.[21]

Again the state of Massachusetts became the leader in promoting the common school idea. In 1837, Massachusetts lawmakers successfully passed legislation that created a state board of education, the first of its kind in the United States. Most likely because of his vigorous support for the legislation in the state legislature, in 1837 the board of education appointed lawyer Horace Mann as its first secretary, a position he held for twelve years. As the state superintendent of schools, Mann raised public school standards not only in Massachusetts but also throughout the entire nation. During Mann's tenure as board secretary, school appropriations in Massachusetts doubled, teachers were given increased wages and subjected to stricter qualifications for entrance into the profession, and the state established three normal schools for teacher training.[22] Mann's work in Massachusetts toward promoting the common school concept was nearly equaled in Connecticut and Rhode Island by Henry Barnard, who later founded the Association for the Advancement of Education and edited the first professional journal for U.S. educators, the *American Journal of Education.*

Once the New England states initiated the common school concept and developed the means for its support, other states soon followed. By the middle of the nineteenth century, nearly every state had adopted some form of publicly supported education at the elementary level. In addition, in 1852 Massachusetts passed the first compulsory attendance law, and by the end of the century, over thirty states had enacted similar compulsory attendance laws.

Creation of the high school

Once the common school concept had gained widespread support, many educators and lawmakers increasingly questioned the view that only an elementary education should be made available to all. If free, tax-supported instruction in writing, reading, and arithmetic could be offered to children, they reasoned, then the same right for some form of advanced education would also seem justified and appropriate.[23] At first this notion was vigorously opposed, yet the idea persisted, and indeed as early as the 1820's a few common schools began to provide courses that clearly went beyond the elementary level.

In 1821 the nation's first high school, the English Classical School, later known as English High School, opened its doors in Boston. It was established chiefly to offer young men practical courses in subjects such as bookkeeping,

business, and mechanics but also provided free instruction in mathematics, surveying, navigation, history, logic, civics, and ethics. Thereafter, high schools soon appeared in other New England cities, notably in Portland, Maine, and Worcester, Massachusetts. In 1825 New York City established its first high school.

Just as lawmakers had played a significant role in early attempts to legislate public education prior to the nation's independence and subsequently in the formation of the common schools, in Massachusetts the development of the high school concept was initiated largely because of a piece of 1827 legislation. The law required towns of five hundred families to provide publicly supported instruction in algebra, geometry, bookkeeping, American history, as well as in the common school subjects. Towns of four thousand additionally were to offer logic, Latin and Greek, and training in rhetoric and oratory. Although the measure did not receive widespread public support at first, it did establish the tone for the passage of similar legislation in other states. Moreover, by the latter part of the nineteenth century, the notion of public financing of high schools also became firmly entrenched, when Michigan's supreme court, finding on behalf of the city of Kalamazoo in litigation initiated by a local taxpayer, found that the high school was an inherent, necessary part of the state's system of public education and upheld the right of local governments to use tax monies for the purpose of financing high school education.[24]

Developments in higher education

The period that followed independence also witnessed the considerable expansion of the number of institutions of higher education in the United States. In the same manner in which the transformation that occurred during the first quarter of the nineteenth century generated a climate that led to the development of the common school and the high school, colleges themselves underwent a similar kind of transformation during the latter part of the eighteenth century and throughout the nineteenth century. In the first place, federal support of higher education, as evidenced by the Morrill Act of 1862, represented a governmental commitment to higher education that had previously not existed. Second, the number of private and public institutions of higher education increased dramatically during the period after 1783. Between 1783 and 1800 alone, for example, fourteen colleges were chartered in the United States, including institutions such as the University of Georgia, the University of North Carolina, the University of Vermont, Bowdoin College, and Middlebury College.

Finally, the identity of institutions of higher education began to change as institutions shifted from a religious to a more secular orientation.[25] Most of the early colleges founded in the United States maintained a strong religious flavor that resulted in an emphasis on theology and studies in divinity. As the eighteenth century ended, however, and as the optimism that characterized the

American transformation in the early nineteenth century left its mark, colleges and universities changed to reflect a more secular outlook. Science, mathematics, law and politics became the dominant subjects to replace theological studies. In 1799, William and Mary College in Virginia, largely because of the influence of Thomas Jefferson, "cleaned house" at the institution with the establishment of chairs in medicine, mathematics, physics, moral philosophy, economics, law and politics; in addition, the institution discontinued its chair in divinity. When, in 1825, the University of Virginia was founded, it was described as a secular university and was the closest university of the time to the present-day concept of a state college or university.

The twentieth century

Introduction

When the United States entered the twentieth century, the fundamental principles that underlie even the present educational system had already been firmly established in some form. Educational sovereignty, though the federal government played an important role, rested largely with the states. Education at the elementary and secondary levels was free and compulsory.[26] Public elementary and secondary education, and to some extent higher education, were supported primarily through local taxation. Finally, day to day control of elementary and secondary education, though overseen generally by the states, rested chiefly with local school districts through boards of education. Whereas the colonial era had been characterized by regionalism and the subsequent period by attempts to define the roles of the individual and government in the provision of education, the modern period perhaps reflects two dominant trends or characteristics: (1) a refinement, reinforcement, and expansion of the public education concept; and (2) a gradual evolution toward a more systematic, centralized, national approach supported increasingly by the federal government. These trends or characteristics have carried with them a pervasive involvement of the law in education.

The growth of public education

During the latter part of the nineteenth century and throughout the twentieth century, both private and public education underwent a significant expansion. In the years immediately following the turn of the century, a typical American youth attended eight years of elementary school followed by four years of high school. This pattern was the standard "eight-four" system and still prevails in some parts of the United States. In 1910, however, as educators began to experiment with the best manner in which to organize the delivery of education, several U.S. cities established what were called junior high schools that frequently comprised the last two years of elementary school plus the first year

of high school. Designed as a transition to link the elementary and secondary levels, the junior high school gave youngsters some of the same "common" subjects as the elementary schools but also allowed for modest specialization as did the high schools. Gradually, more and more school districts, particularly in the larger cities, moved toward the "six-three-three" system.[27]

In addition to the growth in the numbers of schools as well as the slight reorganizations that took place, the number of students being educated increased significantly during the twentieth century. Between 1900 and 1960, for example, the number attending both public and private high schools increased tenfold.[28] Clearly, public and private education have left their marks upon American society as evidenced by their significant expansion during the twentieth century.

As had occurred during the first half of the nineteenth century when many educators as well as legislators began calling for the provision of a public high school concept as well as common school education, in the twentieth century, a similar trend occurred, this time favoring public support of affordable post-secondary education. If elementary and secondary education warranted public support, some maintained, then a strong case could also be made for public provision of some form of tax-supported post-secondary education as well.[29]

The result of this view was the gradual movement of colleges away from a meritocratic selection policy to an open-admission or egalitarian philosophy.[30] In addition, the junior or community college concept that received considerable support during the period following 1960 was the product of such a line of thinking. Largely through the efforts of promoters such as William Rainey Harper, first president of the University of Chicago, and other advocates such as Henry P. Tappan of the University of Michigan, the junior college as an institution emerged during the early part of the twentieth century with the founding of Joliet (Illinois) Junior College in 1901.[31] Other junior colleges soon followed. Conceived of by promoters as an institution where high school graduates could complete the first two years of standard college work at an affordable price, the junior college soon began to provide a heavy practical, vocational emphasis as well. The overwhelming majority of junior colleges received public support through local taxation and were subject to control by a publicly elected board of education. Aimed primarily toward the young high school graduate, junior colleges during just the last ten to fifteen years have begun to design special educational programs to attract a new type of student: the working adult.

It is perhaps this characteristic that today most clearly reflects the product of the educational system's expansion and evolution throughout the twentieth century: Whereas public and private education formerly were designed primarily for the young, a present and growing trend is toward education for the adult learner.[32] Moreover, as the needs of business and industry combined with rapid technological changes that occurred, *e.g.*, the growing reliance upon the

computer, employers have demanded that adults return to school in order to acquire more specialized, practical skills for the performance of work.

Uniformity and federal support

Not only did the twentieth century evidence the expansion of the public education concept; gradually, approaches toward the provision of education became more systematic, uniform, and were supported increasingly by the federal government.

One development that occurred to promote uniformity in the provision of education was the accreditation movement. An initial attempt to certify the quality of schools was made at the University of Michigan in 1871 when faculty members were sent to inspect local secondary schools to certify the schools' ability to prepare students adequately for the university. It was not until the twentieth century, however, that a more carefully designed approach to accreditation evolved. In 1905 the North Central Association of Colleges and Schools was formed and began regional accreditation of secondary schools, and in 1913 the association extended its accreditation practices to colleges and universities as well. Shortly thereafter, five other regional accreditation groups formed: the New England Association of Colleges and Schools, the Middle States Association of Colleges and Schools, the Southern Association of Colleges and Schools, the Northwest Association of Secondary and Higher Schools, and the Western Association of Schools and Colleges. In the last thirty years a growing trend has been toward the development of more specialized professional accreditation groups.

Combined with the emphasis upon accreditation of schools and colleges was the growing federal role in providing a more systematic, uniform approach to the provision of elementary, secondary, and post-secondary education. The federal effort was evident not only through the legislative process but through the judicial system as well. After the passage of the Morrill Act in 1862, the amount of federal aid to education rose significantly. In 1914, Congress passed the Smith-Lever Act which provided for the development of vocational education at the secondary level. The act was designed to aid in the dissemination of practical information on such vocational subjects as agriculture and home economics. The cost of the program was to be shared by the states and the federal government. Most significant about the act, however, was that for the first time the federal government established an element of control in a federal bill granting aid to education. State programs were required to meet standards developed by the Department of Agriculture before grants in aid could be received. These elements of federal and state cooperation and federal supervision distinguished the Smith-Lever Act from the *laissez faire* approach to the Morrill Act; and the significance of the federal role cannot be overlooked.[33]

Subsequent legislation revealed an increasing federal role in the funding and control of public education. The Smith-Hughes Act of 1917 was designed to

promote the preparation of vocational teachers at the land-grant colleges; the bill provided financial aid and direction for this effort. In 1944, Congress passed the "GI Bill of Rights" that provided $14.5 billion to veterans for their financing of a college education. In 1965, the Elementary and Secondary School Act was passed to provide billions of dollars to subsidize elementary and secondary education; at least a part of this national grant in aid was also made available to parochial schools.

Of all the federal involvement with education, perhaps those dealings that involved the judiciary received the greatest attention and interest. Whereas prior to 1900 the Supreme Court had dealt with only nine educational cases, during the twentieth century the Court decided over fifty cases involving educational matters. Most of the cases dealt with civil rights issues in the provision of education, and this occasionally troubled the Court; on more than one occasion, the Court demonstrated great reluctance to interfere with what it perceived to be state administration of the schools.[34] But an overview of the role of the judiciary in the provision of education in the United States may be summarized as follows: Whenever education was regarded as critical to the welfare of the nation, Congress and the states did not refrain from passing legislation affecting the provision of education; likewise, whenever state or federal laws deprived persons of equal protection under the law, the Supreme Court did not refrain from declaring such laws to be unconstitutional and thus void.[35] In this manner, the judiciary as well as the legislative branch of the federal government during the twentieth century contributed to the evolution of a more systematic and coordinated approach to education.

Endnotes

1. A. Meyer, *An Educational History of the American People* 26 (2d ed. 1967).
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3. *See generally* A. Meyer, *An Educational History of the American People* (2d ed. 1967).
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5. *Encyclopedia Britannica*, 6, 357 (1974).
6. 1 S. Morrison, *Three Centuries of Harvard*, 1636-1936 (1936).
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8. J. Blum, E. Morgan, W. Rose, A. Schlesinger, K. Stampp, C. Woodward, *The National Experience: A History of the United States to 1877* 66 (4th ed. 1977) [hereinafter referred to as Blum].
9. A. Meyer, *An Educational History of the American People* 33-34 (2d ed. 1967).
10. *See* A. Meyer, *An Educational History of the American People* 34 (2d ed. 1967), and H. Good, *A History of American Education* 41 (2d ed. 1962). The act gradually came to be known as the "Old Deluder Satan" act because it was through education that the Scriptures would be read; thus, to the Puritans, Satan's temptations would be less likely.
11. *Encyclopedia Britannica*, 6, 357 (1974).

12. J. Blum, *The National Experience: A History of the United States to 1877* 66 (4th ed. 1977).
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14. D. Clark, *Rhetoric in Greco-Roman Education* 12 (1957).
15. H. Good, *A History of American Education* 66-72 (2d ed. 1962).
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18. L. Cremin, *Traditions of American Education 39-88 (1977).*
19. T. Finegan, *Free Schools: A Documentary History of the Free School Movement in New York State* (1921).
20. The term "transformation" is one that many historians apply to the nationalistic, patriotic spirit of the American people during the early part of the nineteenth century.
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25. A. Meyer, *An Educational History of the American People* 209-211 (2d ed. 1967).
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28. *Encyclopedia Britannica*, 6, 381 (1974).
29. *See generally*, W. Harper, *The Trend in Higher Education* (1905).
30. H. Good, *A History of American Education* 443-445 (2d ed. 1962).
31. H. Good, *A History of American Education* 445 (2d ed. 1962).
32. S. Anderson, S. Ball, R. Murphy, *Encyclopedia of Educational Evaluation* 5 (1975).
33. *Encyclopedia Britannica*, 6, 381 (1974).
34. H. Good, *A History of American Education* 583 (2d ed. 1962).
35. H. Good, *A History of American Education* 587 (2d ed. 1962).

What is a school?

Patricia Lines and Judith L. Bray

All states require parents to educate their children, and 38 states make attendance at "school" compulsory. But what is a school? Parents teaching their children at home have argued that the home is a school, but courts are by no means in agreement regarding this assertion.

Schools in church basements, schools in inadequate facilities, and schools that don't look like typical public schools have had to defend their legitimacy to state and local education officials. A "school" in one state may not constitute a "school" in another state where requirements for compulsory education are differently stated or have been differently interpreted by the courts. The peripatetic school taught by Socrates probably would not qualify as a school in the eyes of most compulsory attendance officials.

The issue is not merely semantic. Children who are found during regular school hours in places that do not fit legally acceptable definitions of "school" face truancy charges, and their parents face criminal charges.[1] Regulations for schools are different than for non-schools, and so are benefits. Some laws allow schools to operate in otherwise residential zones, for example, and other laws make schools tax-exempt.

Defining a "school" is a matter of serious interest to children, parents, and educational institutions outside the mainstream. The concern is less simple than one might at first assume, and is sufficiently serious to lead to litigation over the definition. The difficulties posed by vaguely worded or incomplete legislation, which are reviewed below in a discussion of judicial decisions, are persistent enough to warrant consideration by state legislatures of two courses of action: substituting the concept of compulsory education for that of compulsory school attendance, or tightening statutory language to avoid misinterpretation.

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Judicial definitions

Various courts have been asked to define the term "school" as used in a statute or ordinance, in cases brought under different circumstances in different states. Although the courts have been generally willing to interpret the term, a new trend has become evident in recent decisions in Wisconsin and Georgia to strike down those states' compulsory attendance laws as void for vagueness.[2]

At the turn of the century, in *State v. Peterman* (1904), the Indiana Supreme Court defined a "school" in terms of the common usage of the word: "A school, in the ordinary acceptance of its meaning, is a place where instruction is imparted to the young." Applying this definition, the court found that a home instruction program taught by a former public school teacher was a valid schooling experience: "If a parent employs and brings into his residence a teacher for the purpose of instructing his child, and such definition is given as the law contemplates, the meaning and spirit of the law have been fully complied with.[3]

The language used in *Peterman* has been repeated often since 1904, and the standard of "instruction imparted to the young...given as the law contemplates" has become commonplace. In 1917, the same court let stand a decision that parents violated the compulsory education law when they withdrew their 12 year-old daughter from public school to attend private music lessons. The court found that the music lessons could not be considered enrollment in school as envisioned in the school law.[4]

The Supreme Court of Illinois felt the need to define a "school" further in 1938 when a physical education society, teaching gymnastics and swimming, unsuccessfully sought classification as a school. In an ordinary school, physical education is only part of the curriculum, the court found, and it described a school as a "place where systematic instruction in useful branches is given by methods common to schools and institutions of learning, which would make the place a school in the common acceptance of that word."[5] Likewise, in a 1946 New York case applying zoning requirements in a residential district, where a "school" would be permitted, the court held that a riding academy is not a school, limiting the definition to an institution for teaching children, or imparting education to children.[6]

In 1948, the Supreme Court of Ohio refused to grant an exemption from annual bus license taxes to Sunday schools under a provision granting such a benefit generally to "schools." The court accepted the *Peterman* definition but found that the words "school" and "Sunday school" were not synonymous.[7]

The Supreme Court of Illinois followed the *Peterman* rationale to allow a home to qualify as a school in 1950. State law did not allow for home instruction, but it did set requirements for private schools. The court found that home instruction complies with the law if the instruction can meet the private school requirements.[8] As a result of the court's decision, Illinois has set up "home school" administrative procedures.

A year later, an Iowa court found that instruction was indeed being imparted to the young at a nursery school located in a residential zone. Since the zoning laws allowed "schools" in residential areas, and set upward age limits but did not set lower age limits, the school came within the meaning of the law.[9]

In 1956 a California court held that the word "school" could mean the building in which instruction took place, or the body of people within the building engaged in giving and receiving instruction. The court found an ordinance regulating private trade schools unconstitutional, in violation of the commerce clause of the United States Constitution, observing that in order to be constitutional, the ordinance would have to apply only to intrastate activities of schools whose in-state and national functions could readily be separated.[10]

The Illinois court returned to the concept of "systematic instruction" in 1960 to recognize a day camp as a "school." The day camp in question was a private enterprise run by former public school teachers and offered to students in kindergarten and grades one through three all the academic subjects public schools offered.[11]

Extending the *Peterman* standard in 1969, an Indiana court held that the term "school" used in a contract, did not include colleges or universities: " 'school' is a generic term, denoting an institution or place for instruction or education, or the collective body of instructors and pupils in any such place or institution. In the ordinary acceptation of its meaning, a school is a place where instruction is imparted to the young. It is an institution of learning of a lower grade, below a college or university; a place of primary instruction."[12]

The Ohio high court in 1977 had no trouble deciding that an organization dedicated to instruction in baton twirling, percussion instrument playing, and drill formation marching was not a "school" within the meaning of a statute limiting bingo licenses to schools and other specific institutions. The court found that "ordinary acceptation and significance" of the word "school" was clear, citing *Peterman* and other cases above.[13]

By the 1980's, the need for a clearer understanding of what is meant by a "school" has become evident. This decade has witnessed a surge of litigation over where children may be legally educated. For example, in three recent cases parents sought to classify home instruction programs as schools and thus avoid the more restrictive requirements for home instruction under the compulsory attendance laws. While *Peterman* suggests that this is possible, the courts rejected the idea. The Oregon high court affirmed the conviction of a parent who failed to send a child to school, finding that a parent *must* meet the stricter requirements for a "parent or private teacher" teaching the child at home. Oregon law specifically excludes children being instructed by a parent or private teacher from its definition of a "private school."[14] Courts in Colorado[15] and Virginia[16] have reached the same conclusion.

In other recent litigation, courts have been willing to apply a broad dictionary definition of "school" that favors defendants' programs. For example,

in South Dakota, the court, ruling from the bench, entered a directed verdict that a parent was not guilty of violating the compulsory education law. Since the state had established in its case that the children were in fact receiving instruction, and given the dictionary definition of the word "school," the court concluded that schooling was in fact occurring.[17]

The vague attendance law

The Supreme Court of Wisconsin has deviated from this trend. In an unprecedented decision, it declared Winsconsin's compulsory school attendance law void for vagueness. A major issue in two Wisconsin cases, *State v. Popanz*[18] and *State v. White*,[19] was the meaning of the term "private school." In *Popanz*, the school in question, the "Free Thinker School," was upgraded and, apparently for that reason, its name had not been entered in the state's informal directory of private schools. The local school superintendent had informed a parent that he was not in compliance with the law unless his child attended a school listed in the state's directory. He had not otherwise evaluated the Free Thinker School. Since state law did not mention any such directory, and neither state law nor written regulations listed criteria for evaluating private schools, the court reversed conviction of the parent and set aside his two consecutive 90-day sentences.[20] Applying classic analysis for allegedly vague statutes, the court searched the statutes and state department regulations and found no definition of "private school." The court also found no "well-settled meaning in common parlance" for the term. In reviewing the lower court's use of the dictionary definition, the high court found that too much interpretation was required for a citizen to conclude that a "private school" was "an institution that met prescribed curriculum and organizational requirements, and has any academic grade comparable to one found in a standard public school grade division."[21]

In the second Wisconsin case, although defendants had pleaded guilty, the court reversed their conviction and instructed the lower court to dismiss the case. The court indicated several alternative grounds for this decision. For example, one possibility was to reverse because guilty pleas based upon an erroneous understanding of a defendant's legal rights could not be considered voluntary, and a defendant should have the opportunity to withdraw such a plea.[22]

Standing alone, these decisions in Wisconsin provide contrast to the previous litigation involving definition of compulsory attendance laws. However, in 1983, the Supreme Court of Georgia followed the Wisconsin example to strike *its* attendance law for vagueness, thus indicating that a new trend has indeed been set in motion.

The Georgia case involved parents who set up a home instruction program for their three children for religious and safety reasons, even though a local school official had informed them that he did not consider home instruction to

be in compliance with the compulsory schooling law. The parents examined Georgia law and concluded that it did not expressly prohibit home instruction, or explicitly require certification of the parents. State and local officials were notified of the parents' intention to teach their children at home, but the only response was a letter from the state department of education indicating that it was a matter between the parents and local officials.

In reversing the parents' convictions for violation of the compulsory attendance law, the Georgia supreme court focused solely on the vagueness issue, declining to consider the permissibility of home instruction. The court cited the Wisconsin decision in *Popanz* with favor, noting that the Georgia law was "practically identical" to Wisconsin's. Neither the statutes nor administrative regulations defined a "private school," and no guidelines for approving private schools existed. In finding the statute unconstitutionally vague, the Georgia court also held that the law impermissibly delegated authority to local officials, by allowing them to judge, without written criteria, which private programs would be acceptable.[23]

Vagueness in criminal statutes violates one's sense of fair play. It also violates the due process clause of the U.S. Constitution. The U.S. Supreme Court, in *Grayned v. City of Rockford,*[24] set the standards for determining whether a law is unconstitutionally vague. A law must allow citizens to determine what is and what is not lawful, so that it does not "trap the innocent by not providing fair warning" of prohibited behavior. A law must not give too much discretion to the enforcing officials, leaving citizens at their mercy. Finally, laws must not be so unspecific that they inhibit the exercise of protected civil rights. Laws compelling "school" attendance too often fail to meet these standards.

Considerations for legislatures

As state legislatures struggle with ways to serve the interests of both school officials and parents, they should seriously consider what they intend by using the term "school." Statutes requiring compulsory attendance at a "school" and authorizing criminal sanctions for nonattendance elevate the importance of defining "schools."

It might be more fruitful for policymakers to consider what is an "education," and compel children of specified ages to receive an education rather than to attend school. Such an approach focuses more directly on the valid concern that the public has for adequate instruction of children. Mere attendance at school can be a futile ritual; education implies more. Of course, changing the law in this way will allow parents to satisfy the requirement without sending a child to school, and some states do not now permit home instruction or other non-school options. In some states these options have been required by the courts, but the United States Supreme Court has not yet ruled on such a case.

If policymakers prefer to use the term "school," they should be sure to include a number of elements in the statutory language to define a school:

Age of children. All state compulsory schooling statutes state the age of children covered; tax and zoning laws often do not.

Qualifications of teachers. These can be simply stated. One main requirement might be that teachers have successfully completed four years of college.

Hours of instruction.

Extent of academic instruction. Cases involving the classification of baton twirling schools and gymnasiums might not be brought if requirements in this area were clarified.

Requirements for grades, if any. The Wisconsin statute fell because of a dispute over whether school without grades is a school.

If lawmakers prefer to impose different requirements for instruction in the home or in a school, then they must also consider how the two are to be distinguished. One obvious way is to limit home instruction to instruction by a parent of the children of that parent. If a state wished to permit home instruction by someone other than a parent, it could be limited to the children of a single family.

Some choices may have constitutional implications, and the policymaker is advised to examine them carefully. Education is an extremely value-laden endeavor, and there are limits to what the state can compel. The court-ordered exemption of the Amish from compulsory school attendance requirements is just one example.[25] Other constitutional limits to state regulation of private education remain a more serious consideration than the need to define the term; these limits are discussed elsewhere.[26]

Endnotes

1. For a report on sanctions under the compulsory education laws, see Lines, report to NIE, forthcoming. See also Lines, *Private Education Alternatives and State Regulations*, 12 J. of L. & Educ. 189 (1983).
2. *State v. White*, 112 Wis.2d 178, 332 N.W.2d 756 (1983); *Roemhild v. State*, 251 Ga. 569, 308 S.E.2d 154 (1983).
3. *State v. Peterman*, 32 Ind.App. 665, 70 N.E. 550 at 551 (1904).
4. *State v. O'Dell*, 187 Ind. 84, 118 N.E. 529 (1917).
5. *Turnverein Lincoln v. Board of Appeals*, 358 Ill. 135, 192 N.E. 780 (1934).
6. *Village of East Hampton v. Mulford*, 188 Misc. 1037, 65 N.Y.S.2d 455 (N.Y.Sup. 1946).
7. *State ex. rel. Church of the Nazarene v. Fogo*, 150 Ohio St. 45, 79 N.E.2d 546 (1948).
8. *People v. Levisen*, 404 Ill. 574, 90 N.E.2d 213 (1950).
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8. *People v. Levisen*, 404 Ill. 574, 90 N.E.2d 213 (1950).
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11. *Voisard v. County of Lake*, 27 Ill.App.2d 365, 169 N.E.2d 805 (1960).
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14. *State v. Bowman*, 60 Or.App. 184, 653 P.2d 254 (1982).
15. *Gunnison Watershed School Dist. v. Funk*, No. 81-JVB-3 (Colo.Dist.Ct., Gunnison County, Dec. 30, 1981).
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21. *Id.* at 755.
22. *White*, 332 N.W.2d at 757.
23. *Roemhild v. State*, 251 Ga. 569, 308 S.E.2d 154 (1983).
24. 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).
25. *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).
26. *See* Lines, *Private Education Alternatives and State Regulations*, 12 J. of L. & Educ. 189 (1983).

SECTION TWO

School crime and violence

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In earlier times, schools were orderly, peaceful places where students went to study and learn. The old-fashioned image of a one-room schoolhouse filled with eager students dressed in their best clothes and pouring over well-worn books evokes fond memories of days that are now, unfortunately, a part of the past.

Sadly, in far too many cities across our nation today, schools more closely resemble armed camps. Some students come to school carrying weapons or drugs, gang conflicts and violent crime are serious and frequent occurrences, and school officials are forced to behave more like police than educators. In this atmosphere, learning is of secondary importance to students who must spend their time trying to avoid becoming victims. This section examines the problems and some ways in which the courts have dealt with them.

Crime in the school and in the community

Joan McDermott

Crime that occurs inside schools, particularly violent crime, became an issue of increasing concern in the 1970's, as indicated by congressional hearings, special conferences, and a number of research studies, as well as media coverage and public opinion polls of the decade. The concern and debate over crime in schools continues in the 1980's even though, from the evidence to date, the outcry over the problem far outweighs the problem itself.

Generally, there is no strong evidence to support either the view that serious crime in schools has increased markedly in recent years, or the view that serious crime in schools is a problem of significant magnitude.[1] As Wilson points out, "horror stories of teacher X being murdered and student Y being raped" suggest "unnecessary conclusions."[2] Most crimes that occur in school are either petty thefts or minor assaults.[3] Some schools in some communities - particularly high crime communities - do have significant problems with vandalism, violence, and crime; however, violent schools are not the norm.

Research on crime in schools is now an important enterprise, particularly in terms of the evaluation of intervention strategies. The purpose of this paper is to suggest, on the basis of evidence about delinquency and crime in schools and in the community, two perspectives that may provide direction for future analyses of crime in schools.

With few exceptions, most analyses of school crime and most intervention techniques have operated on the assumption that offenders, victims, and persons who fear crime in schools, three conceptually distinct categories, are in reality mutually exclusive groups of young people. However, evidence suggests that this is probably not the case, that some individuals belong to more than one group. The first part of this paper reviews the evidence in terms of the

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phenomenon of crime in schools.

Another characteristic of much of the scholarly work on school crime, as well as popular debates on the topic, is the myopic tendency to view crime and fear of crime in schools as if there were some special feature distinguishing these phenomena from similar phenomena in the community. Some of the hazards of this approach are suggested in the second part of this paper, together with evidence of the link between crime and fear of crime in the schools and crime and fear of crime in the community.

Before discussing these propositions it is necessary to define some terms.

Definitions

In this paper, the term *school crime* refers to crime that occurs inside or on the grounds of (e.g. schoolyards) secondary schools.[4] A *crime* is a violation of the criminal law, whether or not the act is detected, reported, or officially acted upon. Although technically speaking most of the acts which constitute school crime are delinquencies, the term *crime* is used for the specific purpose of excluding status offenses such as truancy, drinking, and smoking. Similarly, the term *victims* is restricted to victims of crime, and excludes victims of unpleasant but noncriminal acts such as bullying, verbal harassment, name-calling, and so forth.

By contrast, the term *fear* in this paper refers to more than simply *fear of crime*. This is because what has been widely regarded and publicized as fear of crime in schools is not only fear of crime, in the sense of anxiety created by a specific perceived threat of harm. From the research conducted to date, what has been measured as fear of crime is more aptly described as apprehension, worry, or anxiety, which in some unknown proportion of cases is actually fear of being criminally victimized.[5]

One final point of clarification is necessary. While recognizing that criminal offending, criminal victimization, and fear in schools are not found exclusively in the youthful population (e.g., teachers are assaulted too), the present analysis focuses entirely on the youthful group. The majority of both offenders and victims of school crime are young; more specifically, most are students. For example, the data gathered in the National Institute of Education's (NIE) Safe School Study indicated that the great majority (74 to 98 percent) of all offenses for which offender information was available were committed by current students at the school in question.[6] Aggregate National Crime Survey (victimization survey) data for the years 1973 to 1977 show that in 76 percent of the total personal crimes[7] reported to have occurred inside the nations' schools, the victims were between 12 and 17 years old. Aggregate victimization survey data from 26 American cities show that most (78 percent) of the reported in-school victimizations[8] involved student victims. Because most school crime involves students as both offenders and victims, it is assumed that the most fruitful approach to the study of school crime is to examine this group.

The offenders, the victims, and the fearful

If we were to identify categories of actors (as opposed to, say, categories of acts or behavior patterns) in research and theorizing about crime, it is probably fair to say that those who break the laws (and to a much lesser extent those who make the laws) have dominated the center stage in criminological thought. Although the study of victims has grown enormously in the past two decades, victimology is a newer and less developed field of inquiry. Fear of crime, as a topic of study, is even more recent and less involved.

Almost always, research and theorizing about crime have restricted themselves to the examination of only one of these groups (the offenders, the victims, or the fearful) at a time. There are, of course, notable exceptions. For example, victimology has historically been concerned with the victim-offender dyad, and, since its introduction by Wolfgang, the idea of victim-precipitated crime has received considerable attention.[9] Research specifying the nature and degree of relationship between victimization and fear of crime is another example of exceptions to the dominant thrust.

The tendency to examine offenders, victims, and fearful youths as separate groups has characterized studies of crime and fear of crime in schools. However, if we were to extract somehow from the youth population the three groups – offenders, victims, and fearful – these groups would not be mutually exclusive. Some (probably many) victims are fearful, but some of the fearful youths are probably offenders, and at least some offenders have also been victims. It is suggested that an examination of the nature and extent of the overlap in these groups will illuminate our understanding of school crime.

Studies which have examined fear of crime in schools have shown a link between previous victimization experiences and fear.

One of the best sources of information on fear of crime in schools is the NIE's Safe School Study. A questionnaire was administered to more than 30,000 students in more than 600 public junior and senior high schools in 1976 and early 1977. Three questionnaire items were designed to tap fear of crime in schools. The first asked the students if they avoided any of a number of places in or around the school (e.g., hallways, restrooms, entrances) because of a fear that someone might "hurt or bother" them there. A separate question asked, "How often are you afraid that someone will hurt or bother you at school?" The third question asked students if they stayed home anytime during the previous month because of fear of being "hurt or bothered" at school.

All three NIE "fear" questions asked students about a fear that someone might "hurt or bother" them. *Fear of crime* refers to anxiety caused by awareness or apprehension of danger of being personally harmed in a criminal incident. Only the first part of the phrase "hurt or bother" can be regarded as a threat to personal safety. The word *bother,* intended to measure such things as harassment, can refer to a variety of annoyances and problems, some of which are relatively minor (e.g., being ridiculed for tattered clothing or a poor

complexion). In an analysis of the Safe School Study data, Wayne and Rubel use the three fear questions to create a scale of "apprehensiveness." From the responses to these questions, the researchers classified the 31,373 high school students as not apprehensive (55 percent), slightly apprehensive (28 percent), moderately apprehensive (15 percent), and very apprehensive (3 percent).[10]

Others have examined fear of crime in schools. As part of a St. Louis study of victimization and fear in schools reported by Hepburn and Monti, 1,799 junior and senior high school students were asked whether they had been afraid that someone would "hurt or bother" them at school. Forty percent of the students said "yes."[11]

Both the Safe School Study data reported by Wayne and Rubel and the St. Louis data reported by Hepburn and Monti indicate some relationship between previous victimization and apprehension or fear. Wayne and Rubel report that 28 percent of the highly apprehensive students had been robbed or assaulted in the previous month, but only 3 percent of the nonapprehensive students had been similarly victimized. The Safe School Study data also show a "ripple effect" of victimization on fear; the greater the proportion of previously victimized students in a school, the greater the apprehensiveness of nonvictims in the school. Hepburn and Monti report a weak relationship between "fear of being hurt or bothered" and an individual's scope of previous victimization.

In their *City Life and Delinquency* study, Savitz, Lalli, and Rosen examined the relationship between juvenile victimization experiences and fear.[12] Some of their findings are important, although neither victimization nor fear are in reference to a school setting.[13] The investigators were "primarily concerned not merely with the presence of fear, but its relative degree."[14] Their juvenile subjects (500 black 13-year-old males in Philadelphia) were given cards with "fear ladders" and asked to set their finger at the amount of fear (or concern or worry) they felt for given offenses.[15] Fear was found to be unrelated to juvenile victimization experiences.

It should be noted that the fear of crime research generally indicates a weak to moderate relationship between previous victimization and measures of fear.[16] It is likely that because fear of crime is difficult to measure, the discrepancy between the results of the Savitz, Lalli, and Rosen study and the research that does show a relationship between victimizations and fear can be at least partially accounted for by the differences in the way fear was measured. It seems reasonable to conclude that in a school setting there is a weak to moderate relationship between previous victimization experiences and fear of crime.

The offender-victim intersection

Criminal offending and criminal victimization are largely viewed as two sides of the coin; in any given event that is labeled a crime, one or more participants are labeled *offender* and one or more participants are labeled *victim*. In most cases, the question of which participant gets which label is resolved simply -

the offender perpetrates the harm, the victim suffers the harm. The blur between the victim role and the offender role has been addressed primarily in terms of the notion of victim precipitation, a concept introduced by Wolfgang to refer to "those criminal homicides in which the victim is a direct, positive precipitator in the crime."[17] However, there is considerable evidence suggesting another merger of victim and offender roles - a person may at one time be an offender and at another time be a victim. This may be particularly true among juveniles who commit and suffer thefts and assaults.

Savitz, Lalli, and Rosen found no significant differences in robbery and extortion victimization between official delinquents and nondelinquents.[18] Feyerherm, from a study of self-reported delinquency and victimization among 1,119 high school students, reports higher levels of theft and assaultive victimizations among juveniles in higher self-reported delinquency levels than those in lower levels.[19] Feyerherm concludes:

> *...these findings amount to a rejection of the notion that victims and offenders are two different sets of persons,...to some extent both roles draw upon the same set of persons. This evidence suggests that there may be some merit in conceiving of the victim-offender relationship almost as a game setting, in which the more often one plays, the more likely it is that he will eventually play in both roles.*[20]

Thus, evidence of the intersection of juvenile victims and juvenile offenders is found both with official delinquents and self-reported delinquents. Although neither of these studies dealt specifically with the extent to which victims and offenders *in school* were drawn from the same set, there is reason to believe that the same intersection is found in school settings. For example, in their St. Louis study of high school students, Hepburn and Monti found that carrying a weapon was associated with both victimization and tolerance of serious behavior.[21]

As Feyerherm[22] observes, the finding that juvenile offenders and victims are not mutually exclusive groups suggests a phenomenon analogous to Wolfgang and Ferracutti's subculture of violence.[23] Hepburn and Monti's evidence of a relationship between carrying a weapon and tolerating serious behavior would seem to support this view. However, conclusions about a subculture of delinquency - in the sense of subculture that carries distinct norms and values which approve criminal offending - are unnecessary. Probably Feyerherm's "game setting" interpretation is accurate, especially in high crime schools and communities where both offenders and victims are caught up in the same social circumstances and exposed to the same dangerous situations. Whether offending is a response to victimization, or offending increases the likelihood of victimization, or both, it would seem that in certain environments both assaultive and theft crimes have survival value; that is, they can be viewed as rational responses to situations (in the school or in the community) and they are not necessarily products of deviant subculture norms and values.

The offender-fearful intersection

If victims and offenders to some extent form a common pool, it is reasonable to expect some relationship between fear of crime and criminal offending. It has been demonstrated that in a prison setting violence and aggression can be viewed as self-preserving strategies.[24] Similarly, offending may be viewed as an adaptive response to fear of victimization.

In the *City Life and Delinquency* research, Savitz, Lalli, and Rosen examined the hypothesis that the status of being a juvenile delinquent would be functional in terms of reducing fear. They found that official delinquents did not differ significantly from nondelinquents either in terms of their perception of the dangerousness of various social settings (e.g., school rooms, schoolyards, streets, subways) or in terms of their fear of criminal victimization (being robbed, assaulted, paying protection, or being killed by teenagers). However, when Savitz, Lalli, and Rosen examined the relationship between gang affiliation and fear some interesting findings emerged. Based on self-report information, the researchers were able to identify "functional" gang members – boys who admitted that their group of friends fought with other groups and that they were expected to participate in group or gang fights (failure to fight would result, the boys felt, in expulsion from the group). Membership in a functional gang produced lower perceptions of danger in most social settings (including schools) and lower levels of fear of criminal victimization. Apparently, although delinquency, at least officially recorded delinquency, was not functional in terms of producing lower levels of fear, membership in a fighting gang was. Interestingly, membership in a fighting gang had other payoffs – fewer criminal victimizations and no higher rates of delinquency.

These findings are important in terms of understanding the relationship between juvenile offending and fear. First, the evidence that in general delinquents are no less (or no more) fearful of victimization than are nondelinquents is evidence of the offender-fearful intersection. Second, some types of delinquency – in this case, membership in a fighting gang – can serve to reduce fear.

The above discussion leads logically to the identification of a fourth area of overlap – the victim-fearful-offender. There are a number of ways in which this probably occurs. For example, a student who is physically assaulted may fear similar attacks in the future, and adapt by creating, in the victimization of others, his own reputation for toughness and virility. Or, violent gangs may fear each other, but continue to fight each other. Finally, a student who is generally insecure, isolated, and apprehensive may react to the theft of her new sweater by stealing another student's running shoes.

In summary, the evidence suggests that the three groups of young people – the offenders, the victims, and the fearful or apprehensive – are not mutually exclusive. Before discussing the implications of this finding, it is necessary to consider another relationship – the relationship between crime, victimization,

and fear in schools and similar phenomena in the community.

The school and the community

In a discussion of crime in schools Wilson observes that:

> *...we must realize that crime does not occur in the schools in isolation from crime in the rest of society. Indeed, much of what is called "crime in the schools" is really crime committed by young persons who happen to be enrolled in a school or who happen to commit the crime on the way to or from school.*[25]

A perspective that does not separate crime in the schools from crime in the community has important implications, in terms of interpretation, explanation, and prevention.

The tendency to view crime in schools as if it existed apart from, or were somehow different than, crime in the community has two unfortunate consequences. First, the blame is placed solely on the schools, or, more precisely, on school officials, administrators, and teachers. Second, solutions are almost always school-related: better teachers, smaller classes, fair and equal treatment of students, relevant subject matter in courses, and tighter discipline.[26] Certainly there are actions that can be taken within schools to lower levels of crime, disorder, and fear. Many of these approaches (e.g., fair and equal treatment of students) have intrinsic value apart from any effect they may have on crime. However, in the long run, reliance on solely school-related interventions may not significantly lower levels of school crime, especially if crime in schools is reflective of crime in the community. Some of the research on crime, victimization, and fear of crime in schools shows strong links between these phenomena and similar phenomena in the community.

The report of the Safe School Study lists a number of characteristics of secondary schools with low rates of student violence and low property loss (through burglary, theft, vandalism, and arson).[27] Both property loss and student violence were found to be lower in schools whose attendance areas had low crime rates. After acknowledging the association between high crime schools and high crime communities, the NIE report minimizes its significance, chiefly because, they report, community crime did not emerge as the most significant factor associated with school property loss in all six categories of schools in the study.[28] The NIE emphasizes instead the role of school factors (large size, impersonality, lack of discipline, lack of coordination between teachers and principals, and so on) in the production of school crime. Unfortunately, because the details of the statistical analyses are not reported, it is impossible to judge from the NIE report exactly how strong or weak any of the associations between the various independent variables (including community crime rate) and student violence or school property loss were.

If high crime schools are associated with high crime communities, it would be reasonable to expect greater proportions of fearful or apprehensive students

in schools located in higher crime communities. When Wayne and Rubel analyzed the NIE fear data, they found a positive relationship between apprehensiveness and violent crime in the student's neighborhood.[29]

Some of the *City Life and Delinquency* findings also shed some light on the issue of fear of crime in the schools. Although a considerable proportion of the young black males rated school rooms (22 percent) and school hallways (34 percent) as "dangerous" (that is, where there was a good chance of being beaten up or robbed), much larger percentages of the youths rated as dangerous schoolyards (44 percent), subways (65 percent), streets just outside their neighborhoods (66 percent), streets going to and coming from school (54 percent), and dance halls, movie houses, parks, and playgrounds (all about 50 percent).[30]

One of the most insightful analyses of the relationship between crime in the schools and crime in the communities is presented by Gold and Moles.[31] Using data gathered in the 1972 National Youth Survey,[32] they address several questions about school crime. Central to their analysis is the question of whether delinquent behavior in school is "best understood as a distinct phenomenon or as part of a more general pattern of delinquent behavior.[33] A comparison of kinds of offenses that were committed in school and committed elsewhere indicated that although personal violence accounted for proportionately more crime in schools than elsewhere, this was because alcohol and drug use dominated the profile of offenses committed elsewhere than school. Gold and Moles explain that:

> *Inasmuch as about 95 percent of the victims of all chargeable adolescent assaults are other adolescents, and the density of peers present is greatest at school, it follows that assaults occurred relatively more often there (although it is good to keep in mind that twice as many assaults occurred outside of school as in).*[34]

Thus, there were no important types of crime differences between school delinquency and community delinquency that could not be explained as a function of opportunity. More important for the present purposes, Gold and Moles also found that "those responsible for more delinquent behavior at school tended to be more responsible for more of the delinquent behavior in the community."[35] School delinquents and community delinquents are the same individuals.

Gold and Moles then checked the hypothesis that the correlates of delinquent behavior in the school and in the community were the same. When a set of predictor variables associated with delinquent behavior was regressed separately on delinquent behavior in school and delinquent behavior elsewhere, the data indicated that the relative importance of predictors of delinquent behavior was quite similar for both sites.[36] Gold and Moles reported that "Indeed, one can hardly discriminate between their correlates, and, by inference, their causes."[37]

In summary, there is ample evidence suggesting that crime and fear of crime in schools should be viewed within a wider community context. High crime

schools tend to be located in high crime communities, and students who are apprehensive or fearful tend to come from neighborhoods with noticeably higher levels of fear. In addition, it is likely that in the judgment of most young people, there are plenty of places in their communities – subways, streets, parks – that are considerably more dangerous than their schools. Lastly, youths who commit crimes in school are probably the same youths who commit crimes in the community.

Conclusions

In order to help put into perspective the related problems of offending, victimization, and fear of crime in schools, this paper has brought together some of the findings of research on these topics. Two of the assumptions which have guided both popular and scholarly thought on school crime can be challenged in the light of this evidence.

One assumption is that criminal offending, victimization, and fear of crime in schools somehow exist apart from offending, victimization and fear among young persons in the community. The indication that this is clearly not the case has enormous implications. For one thing it means that it may be futile to continue to pump scarce federal and other monies into delinquency research and prevention efforts which assume that the source of the problem is the school itself in isolation from the neighborhood or community in which it is located. Efforts can and should be taken within schools to reduce crime and fear of crime, and the literature on the relationship between schools and delinquency suggests that some of these efforts (e.g., attempts to reduce frustration and alienation) may ultimately pay off in terms of reducing delinquency in the community. However, concentrating efforts in the school probably will not have a significant impact in the long run for those schools located in high crime communities, the schools with the very real crime problems.

The school-community link suggests additional problems with some in-school crime prevention strategies. Law and order approaches such as tighter security, stricter rule enforcement, and fortresslike alterations in a school's physical plant may reduce acts of crime and violence in school, only to displace them to the community. Similarly, expelling or suspending troublemakers puts them on the street with nothing to do. Lowering the level of crime in schools may have no real impact on reducing the total amount of crime committed by young people.

Another underlying assumption of research on crime and fear of crime in schools is the assumption that offenders and victims are different groups, and that one group preys on the other. Relatedly, although fear and apprehension have been discussed in terms of the victimized, there has been little attention to the notion that the victimizers themselves are fearful. Yet the evidence shows that these three groups of young people – offenders, victims, and fearful – are not mutually exclusive. In addition, just as "school delinquents" and "com-

munity delinquents" are the same individuals, it may be the case that the "school victims/fearful" and "community victims/fearful" are the same individuals.

The size of the three groups in relation to each other and to the universe, as well as the extent of their overlap, pose intriguing questions for future research. Assuredly, these vary from one community to another. However, a study of these relationships would have theoretical value and would also be fruitful in suggesting strategies of prevention.

Research on crime, victimization, and fear of crime in schools is likely to continue. In the future the more fruitful approaches to the study of crime and fear of crime in schools will be those that use conceptual models that integrate data, rather than those that continue to collect data blindly. This paper has suggested two perspectives which may be of some use.

Endnotes

1. Martin Gold and Oliver C. Moles, "Delinquency and Violence in Schools and the Community," in *Violent Crime: Historical and Contemporary Issues*, James A. Inciardi and Anne Pottieger, eds. (Beverly Hills, Calif.: Sage, 1978), pp.111-124; U.S. National Institute of Education, *Violent Schools - Safe Schools: The Safe School Study Report to the Congress* (Washington D.C.: U.S. Department of Health, Education and Welfare, 1977); McDermott, M. Joan, *Criminal Victimization in Urban Schools*, Analytic Report SF-VAD-8, National Criminal Justice Information and Statistics Service, Law Enforcement Assistance Administration, U.S. Department of Justice (Washington, D.C.: Government Printing Office, 1979).
2. Wilson, James Q., "Crime in Society and Schools," in *Violence in Schools*, James M. McPartland and Edward L. McDill, eds. (Lexington, Massachusetts: D.C. Heath, 1977), p. 43.
3. U.S. National Institute of Education, *Violent Schools - Safe Schools;* McDermott, Criminal Victimization in Urban Schools.
4. Specifically excluded is crime that occurs on neighborhood streets going to and coming from schools. In addition, although most of the research on crime and fear of crime in schools refers specifically to secondary schools, this is not always the case. For example, in McDermott, *Criminal Victimization in Urban Schools*, in-school victimization includes any victimization reported by the victim to have occurred "inside school," with no specification of type of school. Although an unknown percentage of the victimizations probably occurred in colleges and universities, the age of distribution of the in-school victims suggests that the majority are secondary school students.
5. This will be discussed below.
6. U.S. National Institute of Education, *Violent Schools - Safe Schools*, p. 97. Trespassing and break-ins were the exceptions; about half of these offenses were committed by current students.
7. The types of crime in this analysis include rape, robbery, assault, purse snatch, and pocket picking.
8. This includes larceny without contact between the victim and the offender (e.g., the

theft of a sweater from a locker) as well as the types of crimes in note 7, above.

9. Marvin E. Wolfgang, *Patterns in Criminal Homicide* (New York: John Wiley, 1958).
10. Ivor Wayne and Robert J. Rubel, *Student Fear in Secondary Schools* (forthcoming).
11. John R. Hepburn and Daniel J. Monti, "Victimization, Fear of Crime, and Adaptive Responses among High School Students," in *Perspectives on Victimology*, William H. Parsonage, ed. (Beverly Hills, Calif.: Sage, 1979), pp. 121-132.
12. Leonard D. Savitz, Michael Lalli, and Lawrence Rosen, *City Life and Delinquency - Victimization Fear of Crime and Gang Membership*, National Institute for Juvenile Justice and Delinquency Prevention, Office of Juvenile Justice and Delinquency Prevention, Law Enforcement Assistance Administration (Washington, D.C.: U.S. Department of Justice, 1977).
13. Other findings from this study, discussed below, do relate specifically to school settings.
14. Savitz, Lalli, and Rosen, *City Life and Delinquency*, p. 9.
15. Being robbed by adults or teenagers, being assaulted by adults or teenagers, being killed by adults or teenagers, being extorted by adults or teenagers.
16. James Garofalo and John Laub, "The Fear of Crime: Broadening Our Perspective," *Victimology: An Interdisciplinary Journal*, 3(3-4) 1978, pp. 242-253.
17. Wolfgang, *Patterns in Criminal Homicide*, p. 252.
18. Savitz, Lalli, and Rosen, *City Life and Delinquency*.
19. William H. Feyerherm, *The Interrelationship of Various Indicators of Crime*, Ph.D. diss. State University of New York at Albany, 1977.
20. *Id.*, pp. 235-236.
21. Hepburn and Monti, "Victimization, Fear of Crime, and Adaptive Responses among High School Students." Tolerance of serious behavior was measured by level of approach or disapproval for six types of behavior if engaged in by a friend: hurting someone in a fight for the fun of it, breaking school windows, being suspended from school, taking things of less than $2 in value, marking up school walls, and hurting someone in a fight in order to take something from them. Arguably, not all of these behaviors merit the label *serious*.
22. Feyerherm, *The Interrelationship of Various Indicators of Crime*, 235.
23. Marvin E. Wolfgang and Franco Ferracuti, *The Subculture of Violence; Towards an Integrated Theory in Criminology* (London: Tavistock, 1967).
24. Hans Toch, *Violent Men - An Inquiry into the Psychology of Violence* (Chicago: Aldine, 1969).
25. Wilson, "Crime in Society and Schools," p. 48.
26. Some of these solutions emerge from findings of the NIE Safe School Study, discussed below.
27. U.S. National Institute of Education, *Violent Schools - Safe Schools*, pp. 129-130.
28. These include junior and senior high schools in urban, suburban, and rural areas.
29. Wayne and Rubel, *Student Fear in Secondary Schools*.
30. Savitz, Lalli, and Rosen, *City Life and Delinquency*, p. 22
31. Gold and Moles, "Delinquency and Violence in Schools and the Community."
32. This was a "survey of 1,395 boys and girls 11 through 18 years old, representative of everyone in that age span residing in the 48 contiguous states." *Id.*, p. 115.
33. *Id.*, pp. 111-112.
34. *Id.*, p. 116.
35. *Id.*, p. 117.
36. The predictor variables included: sex, situational ethics, age, dates per month, attitude toward school (compared to peers), college plans, relationship with mother, school grades, relationship with father, rural-urban residence, politicalization of

crime, autonomy from parents, attitude toward school, freedom about clothes and hours, and self-esteem.

37. Gold and Moles, "Delinquency and Violence in Schools and the Community," p. 120.

Freeze! How school employees react to student violence

M. Chester Nolte

Myres, a first-year teacher, broke up a fight in the school corridor. He was about to conduct one of the students to the principal's office when he was confronted by a group of 12 to 15 male students who blocked his way. Believing that it was him or the students, the teacher remembered that he had a starter pistol in his back pocket. Pulling it out, he brandished it before the group and told them to freeze. Myres then took the offending student to the office. His principal investigated the event and recommended that even though Myres had acted commendably in stopping a fight, his use of the gun on campus was unacceptable and unnecessary. His conclusion was that Myres was guilty of poor judgment if not unprofessional conduct in the matter. The superintendent held a hearing after which he recommended that Myres be fired, a recommendation that the board carried out. Myres brought suit to recover his position, claiming lack of due process and support from the board of education. The court upheld his termination, with the pointed comment that one of the duties of the board is to determine "that some teachers are not well-suited for handling the pressures or responsibilities encountered by an educator today."[1]

Schools were traditionally considered to be "safe places" where children could be protected from harm while under the supervision of the states. Now however, according to one source,[2] risks of assault and robbery to urban youngsters aged 12 to 19 are greater in school than out. The old saw that teachers should receive "combat pay" is no joke to the more than 1,000 teachers assaulted each month and injured seriously enough to require medical attention.[3] And this number is only the tip of the iceberg: many assaults go

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unreported or are settled in-house before they become statistics.

Some shocking facts

Secretary of Education T. H. Bell reported that violence in the schools has increased since 1978, when the National Institute of Education (NIE) found shocking indications of violence in schools,[4] reporting that each month in America's secondary schools:

- 282,000 students are physically attacked
- 2,400,000 students have their personal property stolen
- 125,000 teachers are threatened with physical harm
- 1,000 teachers are assaulted seriously enough to require medical attention.[5]

Now an aroused public is demanding a return to safer times.[6] During 1983, no fewer than 26 major reports were released indicating what should be done to bring order and excellence back to the schools. Since on the average, a minimum of 157,000 cases of crime occur in American schools in a typical month, one of the points of attack for school boards is the question of how to deal with disruption at the place where it occurs: in the corridors and classrooms of America's secondary schools.

One problem appears to be that of declining effectiveness of the punishments open to educators that are both legally acceptable and educationally sound. Myres' reaction[7] is typical of teachers who must respond when students challenge their control. Where the response is hesitant or ill-advised, leading to litigation where teachers lose, their effectiveness as directors of learning suffers and discipline in the school is thereby undermined.

Teachers on the firing line

Do local boards have broad power to maintain discipline and provide security in the schools? This question was before a New York City court in 1982. A group of junior high school students told their assistant principal that "some boys are trying to take our jewelry." On investigation, he was able to detain five truant male students from another school who were present on the grounds. Police arrived and arrested the truants, who then brought an action against the district for false arrest. In New York, the standard for judging false arrest involves the following elements, as outlined by the court:

> *The action for false imprisonment is derived from the ancient common-law action of trespass and protects the personal interests of freedom from restraint of movement. Whenever a person unlawfully obstructs or deprives another of his freedom to choose his own location, that person will be liable for that interference. To establish this cause of action the plaintiff must show that: (1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement and (4) the confinement was not otherwise privileged.*[8]

The court refused to hold the assistant principal liable and dismissed the suit.

School boards, reasoned the court, have broad powers to control their bailiwicks. As an employee of the board, the administrator shared in that authority, since he was acting under orders from the board. The court pointed out that as one standing *in loco parentis* to the students under his supervision, he had not only the right but the duty to act in their behalf. Since he could reasonably anticipate harm from the intruders, he was within his rights in detaining them until help arrived.[9]

The broad powers of the board to protect those within its territory create an implied immunity for those who bear the burden of carrying out board policy. In Florida, for example, an appeals court ruled that a student "who merely looked suspicious" could be detained in the principal's office for the purpose of a "patting down."[10] According to the court, the criminal law standard for a legal stop does not control a student's detention, even though the principal later in checking him out found a purse containing marijuana. Moreover, school officials do not have to have a reasonable suspicion in order to detain a student and take him to be "checked out" on the premises.[11]

In the same vein, the broad powers of boards to control students may protect board employees who under this rubric may get by with some practices that would be declared unconstitutional in another setting. To combat drug sales in the lavatories, one school district installed two-way mirrors permitting the administrators to scrutinize student exchange of drugs. The court upheld such a practice, balancing the interests of the community against those of the students.[12] And where high school officials placed an undercover policewoman in two classes to investigate drug trafficking, the practice was upheld since it did not disrupt classes nor lead to arrest of any of the students.[13]

Similarly, school boards have been upheld in transferring a student to another school when marijuana was found in his locker,[14] and in suspending and reassigning a student who assaulted a teacher.[15]

Despite these broad common-law powers of local boards, a steady increase has occurred in the number of instances where teachers are called on to intervene in student use and possession of drugs, alcohol, pills, and weapons. A bill introduced in the 1984 session of the Colorado General Assembly, if enacted, would provide legal assistance to any teacher or administrator sued in the line of duty for disciplining a student in school. The bill has the support of teachers' groups in the state. "If you don't have discipline in the schools," says sponsoring State Senator Bob Allshouse, "the only thing you have is anarchy." Many school board members would agree.[16]

Threats, criminal extortion, and negligence

Once principally civil in nature, school law has become increasingly more attuned to criminal law in recent months. The presence of security guards in many schools and the ubiquitous "security program" in the larger districts attest to the changing climate in schools today. Crimes against persons (assault,

narcotics, robbery, sex offenses, trespass and weapons) and crimes against property (arson, bomb threats, burglary, larceny and vandalism) are now an accepted, if not welcome, subject to be addressed in managing the educational enterprise. What is emerging is an entirely different image of the school as a safe place for children to study during their years of compulsory attendance. To say that this calls for new and imaginative approaches to school management is an understatement.[17]

Principals are concluding that they must use their power or they will lose it as illustrated by the following case arising in California. Around 1:30 p.m. of a school day, the principal of an elementary school saw a youth in the hall, and upon inquiry, determined that he had no business in the building. After several attempts to remove the intruder, the principal finally decided to expedite the youth's exit, whereupon the boy shouted an obscenity[18] and resisted efforts to remove him. Finally, as he left, the youth shouted from the street, "I'll go home and get a gun and come back and shoot you." Then as a parting shot, he turned and repeated the threat, "And I'll get you, too!"

California law provides that anyone who causes a public official to refrain from doing an act in the performance of his duties by means of a threat "is guilty of a public offense."[19] A threat can be either a felony or a misdemeanor. At trial, the judge reduced the charge from a felony to a misdemeanor, and the state appealed.[20] The appellate court nullified the conviction on the grounds that the trial judge failed to instruct the jury on the subject of specific intent ("Did he really mean what he said?"). In remanding the case for consideration, the appellate court noted that whether or not the boy intended to carry out his threat was a matter of fact for the jury to determine on appropriate instruction from the court.[21]

The automatic knife

Must school officials give due process consideration when assessing a penalty for violation of disciplinary regulations? There seems to be no question at this junction that due process consideration must be given to grade reductions and grade denials for disciplinary and truancy problems.[22] The question left unanswered is, "At what point can the school levy an automatic penalty without first holding a hearing and going through lengthy procedures aimed at protecting the rights of the student?" The question becomes more than academic where a student is in possession of a dangerous weapon on school property.

It is no secret that many secondary school students go to school armed against attacks on themselves and/or their property. This reflects a tendency in the society at large: when a heinous crime occurs, some citizens run to the gun shops to arm themselves. School officials have contemplated this mind set and have included in their students handbooks lists of proscribed weapons, possession of which leads to automatic suspension or expulsion. Among these weapons is the knife. In at least a dozen cases, boards have been upheld in

levying automatic penalties for carrying a knife in school.[23] The power of the board is seemingly broad enough to include *automatic* suspension and/or expulsion of students found in possession of knives, state actions that would not be legally defensive were it not that the school is a special environment where special limitations on freedom apply.[24]

Excluding students from school activities or from class has been likewise upheld under the board's broad powers to control the school environment. These punishments somehow lack the effect of more direct action taken especially where the punishment does not fit the seriousness of the student's crime.[25]

Some state statutes require truants to be turned over to juvenile court, which in turn may sentence them back to school.[26] However, in the State of Washington, the court held that a juvenile court had jurisdiction only over the parents and not over truants under the compulsory attendance statute. With this interpretation, the juvenile court lacked jurisdiction to fine and order students back to school or to cite them for contempt for failure to obey orders.[27]

One question yet unsettled in student control is whether one's coming upon school property, especially one who is there for no stated purpose, constitutes a trespass. A South Carolina statute prohibits trespass "on the premises of another person," but makes no reference to trespass on public property. Another statute provides that school trustees "shall be deemed to be the owners and possessors of school property." The South Carolina Supreme Court read the statutes together in deciding that trespass on school property is trespass "on the premises of another" and therefore proscribed.[28]

Bus drivers and other employees

Courts are divided on the question of whether bus drivers and other school employees have the right that teachers have to discipline students for misconduct going to and from school. In *People v. Davis*,[29] a bus driver was exonerated for slapping some boys who were throwing candy but was found guilty of battery for slapping a girl who laughed at what was going on. And where a student called the bus driver a "bitch" and said that if the bus did not move soon, she would tell her mother to "get" the driver, and was slapped, the bus driver was convicted of criminal battery.[30] The appellate court found that bus drivers, unlike teachers, are not certified employees and therefore do not enjoy "the willful and wanton standard" teachers enjoy in the area of student discipline.

Conceivably, some teachers would disagree with the court's conclusion that the standard under which teachers operate is so broad as to be "willful and wanton." While their status standing *in loco parentis* does permit teachers some latitude in disciplining students, teachers are at risk when administering corporal punishment to a student,[31] for many have been held liable for assault and battery. What is needed perhaps is a clearer legal definition of the well-

directed kick that stays within the confines of "reasonable" punishment.[32]

Finally, like the automatic knife,[33] the handgun seems legally unacceptable as a means of quieting disruption among high school students. A recess duty teacher was working the boys' rest room area during a break. Suddenly, the teacher was confronted by a male student; an argument ensued and a scuffle occurred. The student was ordered to the principal's office but refused to go. Instead, he wrapped his belt around his fist and threatened the teacher. The teacher then ran to his car and returned with a pistol. He did not point the pistol, but only made it visible. The student saw the weapon and retreated (he was on the point of attacking the teacher with a two-by-four). The police arrived and the teacher surrendered the gun. Ultimately, the Louisiana State Supreme Court found the teacher not guilty on all charges, and insisted that he had acted "in legal justification or self-defense."[34]

Self-defense, as Marshall Dillon of "Gunsmoke" fame would testify, is a United States Marshal's friend, but is it available to the teacher whose duty is to patrol the corridor. At the present time, the courts do not agree, leaving the teacher to speculate whether his responsibilities as a peacekeeper might not be far outdistanced by his lack of control of the situation. Since the law abhors a vacuum, the question of how a teacher's authority can be made coterminous with his responsibility awaits a satisfactory answer in most high schools today.

Summary

No longer can the public school be considered the "safe place" for study and reflection once postulated by the common law. When children act in a criminally disruptive manner in school, they can expect that their actions will spark an equally forceful reaction from their teachers. Not all these reactions will be approved by the courts. Teachers will learn, as John Milton pointed out in "Paradise Lost," that "he who overcomes by force hath overcome but half his foe."

Endnotes

1. *Myres v. Orleans Parish School Board*, 423 So.2d 1303 (La.App.1983). Taken from M. Chester Nolte, *How to Survive as a Principal: The Legal Dimension* (Chicago: Teach 'em, Inc., 1983), p. 177. Whether Myres should have been fired or commended by the board, as would be the case in some districts, the fact remains that one of the causes of the "rising tide of mediocrity" in schools today is an outbreak of violence and crime unprecedented in our nation's history. See generally, *Phi Delta Kappan*, the annual Gallup Poll reports indicating that lack of discipline was the number one problem seen by respondents in 14 of the last 15 years that the reports have been conducted.
2. S. Vestermark, Jr. and P. Blauvelt, *Controlling Crime in the School: A Complete Security Handbook for Administrators* (West Nyack, N.Y.: Parker, 1978), p. 32.
3. T. H. Bell, Guest Columnist, "No Excellence Without Discipline," in *USA Today*, Jan. 10, 1984, p. 8-A.

4. Id.
5. Id.
6. Bell reassures concerned parents that "if parents, teachers and students work together, we can make our schools safe for learning once again."
7. See *Myres v. Orleans Parish School Board*, fn. 1 supra.
8. *Smalls v. Board of Educ., City of N.Y.*, 114 Misc.2d 109, 450 N.Y.S.2d 987, 991 (1982).
9. Id.
10. *W.J.S. v. State of Florida*, 409 So.2d 1209 (Fla.Dist.Ct.App.1982).
11. Id.
12. *Stern v. New Haven Community Schools*, 529 F.Supp. 31 (D.C.E.D.Mich. 1981).
13. *Gordon v. Warren Consol. Bd. of Educ.*, 706 F.2d 778 (6th Cir. 1983). The court ruled that *Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972) was controlling where the United States Supreme Court decided that allegations of subjective chill are not an adequate substitute for a specific claim of objective harm or threat of a specific future harm.
14. *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981).
15. *Washington v. City of N.Y.*, 83 A.D.2d 866, 442 N.Y.S.2d 20 (1981).
16. *Denver Post*, Feb. 2, 1984, p. 10-A.
17. Even private and parochial schools are having similar problems. See for example, *Spell v. Bible Baptist Church, Inc.*, 166 Ga.App. 22, 303 S.E.2d 156 (1983) (due process exercised in expulsion for drinking alcohol); *Milonas v. Williams*, 691 F.2d 931 (10th Cir. 1982) (involuntary placement of students in private school by juvenile court challenged); *Fiedler v. Marumsco Baptist Church*, 486 F.Supp. 960 (D.C.E.D.Va.1979) (interracial romance rule questioned); see also Mawdsley and Permuth, "Legal Problems of Religious and Private Schools" (Topeka: National Organization on Legal Problems of Education, 1983) for a more thorough treatment of problems faced by these nonpublic schools.
18. The epithet, a product of the 1960's campus revolt, is related to a vulgar term for an incestuous son, and denotes disregard for authority in general and the Establishment in particular.
19. Sec. 71 of the Penal Code.
20. *People v. Hopkins*, 149 Cal.App.3d 36, 196 Cal.Rptr. 609 (1983).
21. Id.
22. See generally L. Liggett, Discipline by Grade Reduction and Grade Denial Based on Attendance, School Law in *Changing Times* (Topeka: NOLPE, 1982), pp. 40-9.
23. "Undeniably, the School Board has the right, power, and duty to make and enforce a rule against bringing weapons to school * * *. The Board is also under an obligation to provide a safe environment for the children so they can learn. * * * Because the rule and the punishment for violating the rule clearly are rationally related to the goal of providing a safe environment, * * * it comports with substantive due process." *Mitchell v. Bd. of Trustees*, 625 F.2d 660 (5th Cir. 1980). See also *People v. Guillermo M.*, 130 Cal.App.3d 642, 181 Cal.Rptr. 856 (1982) ("bulges" in a pocket led to a legal search for a weapon); *McClain v. Lafayette Co. Bd. of Educ.*, 673 F.2d 106 (5 Cir. M.S. 1982) (automatic expulsion rule for possession of weapon not violative of due process requirement); *Reineman v. Valley View Comm. Sch. Dist.*, 527 F.Supp. 661 (D.C.N.D.Ill.1981) (handicapped student legally suspended for possession of knife in school); *C. J. v. School Bd. of Broward Cty.*, 438 So.2d 87 (Fla.App.1983) (boxed commemorative knife does not fit board's requirement of automatic expulsion for possession of a "knife").
24. See generally, Nolte, *How to Survive as a Principal: The Legal Dimension* (Chicago: Teach 'em, Inc., 1983) for legal strategies acceptable to the courts, and

"Grade Reduction and Grade Denial Based on Attendance," Topeka: NOLPE, Case Citation Series, 1982.

25. *Bernstein v. Menard*, 557 F.Supp. 90 (D.C.E.D.Va.1982) (bandmaster excludes student from band; such exclusion does not violate any constitutional right to be free from unwanted discipline); *Rubertone v. Board of Educ.*, N.J. Comm'r. of Educ. Decision, 1979 (removal of student from history class and placement in a study hall upheld).

26. An example of this type of statute is Colorado's "anti-dropout" law which requires truants to be brought before the court to show cause why they are not in school on a regular basis.

27. *State v. Turner*, 98 Wash.2d 731, 658 P.2d 658 (1983).

28. *In the Interest of Joseph B.*, 278 S.C. 502, 299 S.E.2d 331, 332 (1983).

29. 88 Ill.App.3d 728, 43 Ill.Dec. 673, 410 N.E.2d 673 (1980).

30. Two different fact situations were involved in *People v. Davis*, 88 Ill.App.3d 728, 43 Ill.Dec. 673, 410 N.E.2d 673 (1980). In this second case, the court remanded the case for the trial court to determine whether the bus driver's conduct fell within the bounds of privilege. The court noted that a limited privilege to control student conduct flows from the responsibility of the bus driver to maintain safety on the bus; in any case, this privilege is not as broad as that of the classroom teacher.

31. However, a "mere touching does not constitute corporal punishment." *In the Tenure Hearing of Fred J. Gaus, III*, N.J. Comm'r. of Educ. Decision, 1979.

32. Although a 12-year-old student suffered embarrassment when he was struck by the teacher's foot while turned around in his seat talking, he suffered no physical harm and there was no battery. The court said that it was a reasonable kick, under the circumstances. *Thompson v. Iberville Parish Sch. Bd.*, 372 So.2d 642 (La.App.1979).

33. Guns in school are unacceptable not only for students but generally for teachers as well, even tough the motives of the teacher are exemplary. It seems inconsistent to send teachers into the fray, however, unarmed while students themselves are armed. This area of the law is murky to say the least, and must be clarified if the schools are to become the safe havens they once were considered to be.

34. Teachers of course cannot anticipate that their use of a handgun in school will prove to the court to be self-defense. Just what kind of an "equalizer" is needed is certainly not apparent at this time. *Landry v. Ascension Parish School Bd.*, 45 So.2d 473 (La.App.1982).

Substantive due process in student discipline: The judicial role

B. Glen Epley

When 14-year-old David Evans was expelled from Astronaut High School in October 1983, he was chagrined. He had taken but one pill, substance then unknown, and he had no prior disciplinary problems. Yet the Brevard County, Florida, School Board expelled him, as it would ultimately expel over 110 students during 1983-1984, for the remainder of the school year including summer school. The mandatory penalty for first-time drug users was the same as for multiply convicted drug abusers and dealers. Surely, David thought, this unreflective punishment is an abuse of power, a contradiction of substantive due process rights that the courts would remedy.

Young Evans's complaint is a logical extension of the Supreme Court's maxim that students do not shed their constitutional rights at the school house gates,[1] including their right to both substantive and procedural due process.[2] Following the *Tinker* decision in 1969, court dockets were flooded with cases focusing on procedural due process: the right to written notice of charges, a full and fair hearing before an impartial party, legal counsel, opportunity to present and cross-examine witnesses, and so forth.[3] In these matters, the judiciary did not hesitate to instruct schools as to their legal obligations in respecting constitutional rights of students. As the procedural guidelines became refined, students began to turn to substantive concerns. Here, the judiciary paused, reluctant to substitute its judgment for the school board's in disciplinary matters. An Illinois court noted that

> *School discipline is an area which courts enter with great hesitation and reluctance – and rightly so. School officials are trained and paid to deter-*

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mine what form of punishment best addresses a particular student's transgressions. They are in a far better position than is a black-robed judge to decide what to do with a disobedient child at school.[4]

The courts have not been reluctant, however to intervene when a student has been abused. As early as 1853, the Indiana Supreme Court held a teacher liable for striking a student with whips and kicking him in the face because he had misspelled a word and refused to try again.[5] But in determining the demarcation between intrusive judicial interference and proper censure of unwarranted violations of fair play, the courts must walk a fine line.

School authorities, too, must make difficult choices in securing a climate that is disciplined but not odious. The policing of drugs and alcohol, for example, presents a dilemma. Both are such execrable influences that many boards have taken strong measures to control their presence at school. On occasion, students believe that school boards go too far and ask the court to intervene.

An Arkansas tenth grader sought judicial relief after he was expelled for leaving school without permission and returning to go on a band trip intoxicated. Both the federal district and appellate courts concluded that the board violated the student's substantive due process rights by construing its own regulations erroneously.[6] Specifically, the courts believed that the student was suspended under the penumbra of section 11 of its rules, which called for mandatory expulsion of students under the influence of "narcotics or other hallucinogenics, drugs, or controlled substances classified as such by Act 590 of 1971, as amended."[7] Because Act 590 specifically exempted alcohol from its definition of narcotic, controlled substance, or other hallucinogen, the district court held that the board treated the student unfairly in using this section of its rules to expel him.[8]

A divided Eighth Circuit Court of Appeals affirmed the district court's holding because "the express terms of section 11 apply only to 'Drugs' and expressly exempt alcohol."[9] The court of appeals noted that although *Wood v. Strickland* specifically prevented the federal judiciary from relitigating "evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations,"[10] the case at bar differed because the board "construed its own regulations unreasonably."[11]

The United States Supreme Court disagreed. In a 6-3 *per curiam* decision, the court found that "[a] case may be hypothesized in which a school board's interpretation of its rule is so extreme as to be a violation of due process, but this is surely not that case."[12] Noting that "the court of appeals was ill-advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement,"[13] the Supreme Court concluded the "Board's interpretation of its regulations controls."[14] The expulsion was upheld.

McCluskey will not join *Tinker*, *Goss*, and *Wood* as landmark student rights decisions, and on its face the issue seems unimportant. It may harken a retreat from judicial emphasis on protecting student rights, but more likely the case

indicates the high court's renewed support for the discretion of local officials. In allowing the expulsion to stand, the court began to draw the opposite parameter for student rights, the line that students may not cross in disputing the responsibility of school boards to maintain an environment conducive to education.

Judicial respect for school authority

The desire to support school authorities is evident in a variety of jurisdictions. Some courts do not believe that children have constitutional protection for punishment in public schools; indeed, some courts suggest that not enough discipline is present.[15] The courts are reluctant to place themselves between school authorities and recalcitrant students. The United States Fifth Circuit has noted that school matters are best resolved within the school system. If some believe the rules too harsh, the proper forum for petition to change the rules is the school board, not the courts.[16]

Even mandatory punishments that treat all offenders, even those in whose cases mitigating circumstances are present, with the same severe sanctions have found a supportive judiciary. An Illinois school board expelled for the remainder of the 1982-83 school year a high school girl who was in possession of a number of caffeine pills.[17] The district superintendent testified that he considered the girl's conduct to be "serious and destructive."[18] He reported that when students are found possessing or using drugs, they are normally suspended immediately and then usually expelled.[19] The principal of the school told the court that, because of the seriousness of the violation, previous records of students are not taken into account when expelling them for possession of drugs.[20]

The trial court could not abide by the school authorities' decision. Although it did not find the board's action to be arbitrary or capricious, the court believed that because the student had a good record and because caffeine pills are not a controlled substance, she deserved another chance.[21] The appellate court disagreed, observing that "the dissemination of drugs, whatever their legal status, to fellow students endangers the physical health of those students and need not be tolerated by the school board."[22] Further, in light of the serious consequences attending the possession and use of drugs, the court found the school board was justified in its draconian punishment. The expulsion was upheld.

The United States Fifth Circuit Court of Appeals heard a similar case. Here a student brandishing a knife threatened to kill another child. The mandatory penalty for possessing knives at school was automatic expulsion. According to the court, "[t]he legal issue...is whether, as a matter of substantive due process, a student is guaranteed some discretion by the [s]chool [b]oard in fixing the punishment for violation of a rule. The plaintiffs argue they have such a right; we disagree."[23] The court reasoned that the school board has the power

to ignore its own rules; technically, then, no punishment is "mandatory" in every case. The court considered that the key element was not the mandatory nature of the sanction but its nexus with the infraction and the purpose of the schools. In the case at bar, the court found that [b]ecause the rule and the punishment for violating the rule clearly are rationally related to the goal of providing a safe environment in which children can learn, it comports with substantive due process."[24]

Even in alleged First Amendment rights violations, the courts tread lightly. Five students in Indiana distributed leaflets advocating a walk-out and were suspended pending a hearing.[25] Nine calendar days later, a hearing officer recommended expulsion for the remainder of the semester. The school board reviewed the recommendation and upheld the expulsion.

The students claimed that their First Amendment rights were violated in that the distribution of the literature was a protected free speech right.[26] The defendants maintained that a walk-out less than 24 hours before the leaflets were distributed had caused serious disruption of the education process, and that they could reasonably forecast a repeat disruption.[27] The court agreed, noting that, "once a reasonable forecast of material interference with the school's work is made, school officials should be accorded a wide degree of discretion in determining the appropriate punishment to be imposed."[28]

The plaintiffs alleged that, even if a reasonable forecast could be made, the school board subsequently violated their substantive due process rights by not acting as an impartial fact finder but merely as a rubber stamp for the administrator's action.[29] The court could find no evidence of partiality and concluded, "[i]t is a judgment call and...the [c]ourt will not substitute its judgment for that of school officials."[30] The court did note, however, that it would not fail to intervene if school officials become hardened to fundamental fair play and justice.[31]

Defining fair play for school authorities poses another problem for the judiciary. School officials are presumed to be benevolent toward their students whereas policemen act as adversaries of criminal suspects; thus, the rules governing police action may not be appropriate for school persons.[32] The courts have refused to hold a lay board to the standard of applying common-law rules of evidence in a disciplinary hearing,[33] and have ruled that Miranda warnings are not necessary safeguards for student interrogations by administrators.[34] Indeed, it appears that schools must stray very far indeed before the courts will call foul. The Fourth Circuit Court of Appeals has warned that corporal punishment may violate substantive due process, but only if the punishment was "so severe, was so disproportionate, and was so inspired by malice or sadism...that it amounted to a brutal and inhuman abuse of official power literally shocking to the conscience."[35]

In none of these decisions did the court dispute that students have substantive due process rights. However, the judicial tendency seemed to favor allowing

locally elected officials to run their schools with a minimum of judicial intervention. In an age of severe criticism of public education, judges may have come to believe it necessary to err on the side of the authorities if such support will help improve the educational environment.

Overstepping the bounds

On a few occasions, the courts have decided that a board action exceeded the boundaries of fair play without being inspired by malice or sadism. When an eleventh grade Pennsylvania girl admitted to drinking a glass of wine in a restaurant while on a field trip to New York City, she was suspended for five days, expelled from the cheerleading squad, and expelled from the National Honor Society.[36] In addition, her final grade in each of her classes for the second marking period was reduced by ten points.

The student challenged only the grade reduction penalty on the grounds that the offense for which she was being punished was unrelated to academics, and that her permanent academic record should not be altered substantially because she had one glass of wine. The court noted that "in absence of a gross abuse of discretion, courts will not second guess policies of the several board of directors."[37] In the instant case, however, the court ruled it illegal to misrepresent scholastic achievement for reasons irrelevant to the achievement being graded.[38] The board policy of reducing grades for misbehavior unassociated with academics was an "illegal application of the Board's discretion and...the grade reduction was improper."[39]

In other recent cases where the courts have intervened, the gravamen turned more on semantics than on a claim of student mistreatment. A Washington appellate court reversed a 64-day suspension imposed on a girl who drank one glass of champagne at home before attending a school-sponsored dance.[40] The court focused on two school board rules: one called for mandatory suspension of any student who drank alcohol before attending a school dance; the other expressly limited long-term suspensions to cases in which alternative forms of punishment had either failed or could reasonably be predicted to fail. The school claimed that the first rule was directed at a specific activity and was needed to stop the significant problem of drunken students at school dances. The girl claimed that the second rule protected her from being made a sacrificial lamb to stop the sins of others. The court held that punishment in excess of the board's own rules was a violation of substantive due process, even if the intent of the punishment was justifiable. The second rule controlled, and the suspension was vacated.[41]

The courts also were willing to intervene in Florida and Kentucky, although their rulings do more to obfuscate than to clarify the immunity that school boards might expect in establishing mandatory punishments. In Kentucky, three band members were expelled under a mandatory expulsion policy for drinking while on a band trip.[42] The trial court not only reinstated the band members on

the grounds that the school board had considered no factors other than the consumption of alcohol, it also struck the mandatory expulsion rule. On appeal, the court sustained the reinstatement of the aggrieved students, but it overruled the striking of the mandatory expulsion policy. The appellate court noted that the trial court had decided the board erred in not considering such factors as the past conduct record, academic standing, probability of repeat violations, or alternative punishments before voting for expulsion, and thus acted arbitrarily.[43] Yet the appellate court found the school board fully within its power to create a rule that specifies mandatory expulsion on the first drug-related offense. Just how such a rule could be enforceable and at the same time not be arbitrary, the court did not say.[44]

Comparable logic controlled a Florida decision. Quite by accident, school authorities confiscated from a 13-year-old girl an inscribed, bonehandled knife bought by her father as a gift for her boyfriend.[45] The knife was in a pouch, packed in a gift box, and wrapped with paper. The school board's policies mandated expulsion for any student possessing, using, or transmitting any weapon and defined weapon to include knives. The girl was expelled for the 1982 summer session and the 1982-83 academic year.

The court ruled, "the mandatory policy that existed here is enforceable,"[46] but not in this case. The court would allow a strict policy only on the condition that the school board "toe the mark" and be punctilious in its language.[47] The court had "no misgiving...of the [b]oard's position at oral argument that if a student with a knife asked a second student to take the knife to the principal's office and en route the second student was stopped by an official, the second student would be expelled."[48] But in the case at bar, the board "did not dot all (its) 'i's' and cross all (its) 't's' "[49] when it did not make its definition of weapons inclusive of commemorative knives.[50]

If some courts' position on substantive due process is that mandatory expulsion policies may exist if they are applied only in selected instances, then perhaps a wiser course was charted by a New York court when it allowed the educational bureaucracy to police its own substantive due process disputes. The Commissioner of Education in New York reinstated a student who was expelled after he allegedly assaulted a woman, who was neither an employee nor student of the school district, at her home during a school vacation.[51] The commissioner decided that the board had acted *ultra vires* when it punished a student for actions unrelated with his school. The court upheld the commissioner's decision, asserting that the court may not substitute its judgment for that of the commissioner unless his decision lacks a rational basis or is arbitrary or capricious.[52]

Implications

Taken even in the most favorable light for the students involved, the cases above illustrate a clear desire of the judiciary to protect the right of school

officials to discipline students in the manner they deem appropriate. Perhaps this is best expressed by Federal District Court Judge Polozola when he observed:

> *For the Court to inject itself into the manner in which school administrators wish to discipline school children would constitute a significant intrusion by the Court into an area of primary educational responsibility.*[53]

The result of this judicial restraint is that school officials are afforded broad discretion in assigning punishment. With this discretion comes added responsibility: school authorities are in effect the tribunal of last resort. New teachers learn quickly that hasty, ill-advised, or intransigent punishments often hurt the innocent but do little to impede the trespasses that the punishment was designed to stop. Without judicial bridle to save them from their own folly, school officials will need to contemplate soberly the unintended results of their policies. The courts have often stated that children have little need for onerous procedures to protect themselves from benevolent school officials; school officials have the opportunity, and the responsibility, to prove that students need little court protection of their substantive due process rights as well.

And what of young Evans, the lad who lately took one caffeine pill in Florida and was suspended for the entire year? His case was dismissed in April 1984 by Florida's Fifth District Court of Appeal - without comment.

Endnotes

1. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 at 506, 89 S.Ct. 733 at 739, 21 L.Ed.2d 731 at 737 (1969).
2. *Wood v. Strickland*, 420 U.S. 308 at 325, 95 S.Ct. 992 at 1002, 43 L.Ed.2d 214 at 227 (1975).
3. *See generally, Pervis v. LaMarque Independent School Dist.*, 466 F.2d 1054 (5th Cir. 1972); *Dunn v. Tyler Independent School Dist.*, 460 F.2d 137 (5th Cir. 1972); *Vail v. Board of Educ. of Portsmouth*, 354 F.Supp. 592 (D.N.H. 1973); *Fielder v. Board of Educ.*, 346 F.Supp. 722 (D.Neb.1972); *Pierce v. School Comm. of New Bedford*, 322 F.Supp. 957 (D.Mass.1971); *Davis v. Ann Arbor Public Schools*, 313 F.Supp. 1217 (E.D.Mich.1970); *Murray v. West Baton Rouge Parish School Bd.*, 472 F.2d 438 (5th Cir. 1973); *Black Coalition v. Portland School Dist. No. 1*, 484 F.2d 1040 (9th Cir. 1973); *Fielder v. Board of Educ. of Winnebago*, 346 F.Supp. 722 (D.Neb.1972); *DeJesus v. Penberthy*, 344 F.Supp. 70 (D.Conn.1972); *Soglin v. Kauffman*, 418 F.2d 163 (7th Cir. 1969), and *Sullivan v. Houston Independent School Dist.*, 307 F.Supp. 1328 (S.D.Tex.1969). See also, "Student Discipline: Suspension and Expulsion, A Legal Memorandum," (Reston, Va.: National Association of Secondary School Principals, June 1975).
4. *Donaldson v. The Board of Education for Danville School District No. 118*, 98 Ill.App.3d 438 at 439, 53 Ill.Dec. 946 at 948, 424 N.E.2d 737 at 739 (1981).
5. *Gardner v. State*, 4 Ind. 632 (1853).
6. *McCluskey v. Board of Education*, No. 80-5100 (W.D.Arkansas January 15, 1981), aff'd, 662 F.2d 1263 (8th Cir. 1981).

7. *Id.*, at 1265.
8. The district court recognized that the board did have the authority to expel the student under sections 9 and 10 of its policy. Section 9 allows the board to suspend or expel any student for good cause; section 10 defines good cause as including the use of alcoholic beverages. A letter was sent to the plaintiff's parents citing both sections 10 and 11. The district court found as a matter of fact that the board used section 11 to expel the student. *Id.*
9. *Id.*, at 1267.
10. *Wood, supra* note 2, 420 U.S. at 326, 95 S.Ct. at 1003, 43 L.Ed.2d at 227.
11. *McCluskey, supra* note 6, at 1267.
12. *Id.*, 458 U.S. 966 at 969, 102 S.Ct. 3469 at 3471, 73 L.Ed.2d 1273 at 1277, 5 E.L.R. 136 at 139 (1982).
13. *Id.*, at 968, 102 S.Ct. at 3471, 73 L.Ed.2d at 1277, 5 E.L.R. at 138; quoting *Wood, supra* note 2, 420 U.S. at 325, 95 S.Ct. at 1002, 43 L.Ed.2d at 227.
14. *Id.*, 458 U.S. at 969, 102 S.Ct. at 3472, 73 L.Ed.2d at 1277, 5 E.L.R. at 139. Justices Stevens, Brennan, and Marshall dissented. The bulk of the dissent focused on the Court's predilection to provide *per curiam* decisions to correct lower court errors when the cases themselves do not have sufficient national importance. Justice Stevens did shoot one arrow at the decision itself when he mused, "[i]f the student had been unjustly suspended, I wonder if the court would consider the matter of sufficient national importance to require summary reversal. I doubt it." *Id.*, at 970, 102 S.Ct. at 3473, 73 L.Ed.2d at 1279, 5 E.L.R. at 140.
15. *See*, for example, *Fisher v. Burkburnett Independent School District*, 419 F.Supp. 1200, 1201 (N.D.Texas 1976) and *Petrey v. Flaugher*, 505 F.Supp. 1087 (E.D.Kentucky 1981).
16. *Mitchell v. Board of Trustees of Oxford Municipal Separate School District*, 625 F.2d 660 (5th Cir. 1980).
17. *Wilson v. Collinsville Community Unit School District No. 10*, 116 Ill.App. 557 at 558, 71 Ill.Dec. 785 at 786, 451 N.E.2d 939 at 940, 12 E.L.R. 863 at 864 (1983).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*, at 560, 71 Ill.Dec. at 788, 451 N.E.2d at 942, 12 E.L.R. at 886.
23. *Mitchell, supra* note 16, at 662.
24. *Id.*, at 665. See also *Caldwell v. Cannady*, 340 F.Supp. 835 (N.D.Texas 1972) and *Fisher, supra* note 15.
25. *Dodd v. Rambis*, 535 F.Supp. 23, 3 E.L.R. 595 (S.D.Indiana 1981).
26. *Id.*, at 28, 3 E.L.R. at 600.
27. *Id.*, at 29, 3 E.L.R. at 601.
28. *Id.*, at 30, 3 E.L.R. at 602.
29. *Id.*, at 31, 3 E.L.R. at 603.
30. *Id.*
31. *Id.*
32. *See generally, Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977).
33. *Racine Unified School District v. Thompson*, 107 Wis.App. 657, 321 N.W.2d 334, 4 E.L.R. 1294 (1982). The court went so far as to say, "We can conceive of no reason why school staff would fabricate or misrepresent statements." *Id.*, at 664, 321 N.W.2d at 337-38, 4 E.L.R. at 1297-98. See also *Boykins v. Fairfield Board of Education*, 492 F.2d 697 (5th Cir. 1974), *cert. denied*, 420 U.S. 962, 95 S.Ct. 1350, 43 L.Ed.2d 438 (1975) and *Tasby v. Estes*, 643 F.2d 1103 (5th Cir. 1981).

34. *Birdsey v. Grand Blanc Community Schools*, 130 Mich.App. 718, 344 N.W.2d 342, 16 E.L.R. 297 (1983); *Boynton v. Casey*, 543 F.Supp. 995, 5 E.L.R. 885 (D.Maine 1982); and *Tarter v. Raybuck*, 556 F.Supp. 625, 9 E.L.R. 872 (N.D.Ohio 1983).
35. *Hall v. Tawney*, 621 F.2d 607 at 613 (4th Cr. 1980). For other recent corporal punishment cases regarding substantive due process rights, see *Hale v. Pringle*, 562 F.Supp. 598, 11 E.L.R. 203 (M.D.Alabama 1983) and *Rhodus v. Dumiller*, 552 F.Supp. 425, 8 E.L.R. 267 (M.D.Louisiana 1982).
36. *Katzman v. Cumberland Valley School District*, ____ Pa.Cmwlth ____, 479 A.2d 671, 19 E.L.R. 318 (1984).
37. *Id.*, at ____, 479 A.2d at 674, 19 E.L.R. at 321; quoting *Commonwealth v. Hall*, 309 P.Superior 407 at 412, 455 A.2d 674 at 677 (1983).
38. *Id.*, at ____, 479 A.2d at 675, 19 E.L.R. at 322.
39. *Id.*
40. *Quinlan v. University Place School District 83*, 34 Wash.App. 260, 660 P.2d 329, 9 E.L.R. 1090 (1983).
41. *Id.*, at 261, 660 P.2d at 330; 9 E.L.R. at 1092. The court was of the opinion that no other form of punishment had been tried and that, given the record of the student, the board could not reasonably predict that alternative punishments would fail. See also *Darby v. Schoo*, 544 F.Supp. 428, 5 E.L.R. 1124 (W.D.Michigan 1982).
42. *Clark County Board of Education v. Davis*, ____ Ky.App. ____, 625 S.W.2d 586, 1 E.L.R. 1380 (Ky.App.1981).
43. *Id.*, 625 S.W.2d at 588, 1 E.L.R. at 1382.
44. Perhaps a clue can be found in the court's words: "Upon reviewing the record as a whole, the trial court's finding is not clearly erroneous...Although this court may have decided the issue of arbitrariness differently, it cannot set aside the findings of the trial court if such findings are supported by substantial evidence." *Id. See*, also, *Mitchell v. Board of Trustees of Oxford Municipal Separate School District*, supra.
45. *C.J. v. School Board of Broward County*, Fla.App., 438 So.2d 87, 13 E.L.R. 1177 (1983).
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* Board policy defined weapon in part as "2. Knives-switchblade, hunting or any knife used to intimidate." *Id.*
51. *Board of Education of Millbrook Central School District, Dutchess County v. Ambach*, 96 A.D.2d 637, 465 N.Y.S.2d 77, 12 E.L.R. 483 (1983).
52. *Id.*, at 466, 465 N.Y.S.2d at 78, 12 E.L.R. at 484.
53. *Rhodus v. Dumiller*, 552 F.Supp. 425 at 428, 8 E.L.R. 267 at 270 (M.D.Louisiana 1982). See also *Diggles v. Corsicana Independent School District*, 529 F.Supp. 169, 2 E.L.R. 414 (N.D. Texas 1981); *Bernstein v. Menard*, 557, F.Supp. 90, 9 E.L.R. 885 (E.D.Virginia 1982); and *Petrey v. Flaugher*, 505 F.Supp. 1087 (E.D.Kentucky 1981).

SECTION THREE

Potential legal remedies

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Though current problems in many of our nation's schools are very serious, the situation is not hopeless. Various innovative ideas have been proposed and tried in the school setting. In the courts and in state legislatures, new twists on some old, established remedies have been explored.

This section seeks to acquaint the reader with two such remedies – restitution and parental liability – which have been considered by some courts and state legislatures as possible solutions to the growing problem of vandalism of school property.

Restitution for damages to public school property

Jeri J. Goldman

School vandalism has reached epidemic proportions throughout the United States and continues to mount at an alarming rate. Aside from costs of additional security measures and of increased insurance rates, losses due to vandalism in public schools alone rose from $200 million in 1971 to over $600 million in 1977, with no deceleration in sight.[1] Vandalism may cost a school district as much as $24 per student annually.[2] According to the April, 1975, report of the Senate Subcommittee to Investigate Juvenile Delinquency, the yearly cost of vandalism to public schools equals the total amount spent on textbooks in every school in the country, and even the annual cost of replacing windows broken by vandals in an average city's schools is equal to the cost of a new school building in each city each year.[3]

Most of the perpetrators of school vandalism are children, adolescents, and young adults. According to the FBI, 77% of those arrested for vandalism are under 18 years of age, with the largest number being from 12 to 14 years old, and other surveys place the modal age of school vandals at from 8 to 14 years.[4] The high prevalence of vandalism among juveniles is also suggested by the fact that offenses against property accounted for 36% of court referrals of juveniles in 1976, a close second only to status offenses (37%) – whereas drug offenses, an area of such well-publicized concern, constituted only 7% of such referrals.[5] Although school vandalism occurs most frequently among males and among students of either sex whose academic performance is poor, it cuts across other demographic lines of socioeconomic status, race, and urban-suburban variables, constituting a problem of truly national scope.[6]

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Damage to school property is doubtless a matter of proper concern to a school board, as the acquisition, maintenance, and preservation of school property are part of its legal duties.[7] In order to carry out its primary function of educating its students, the school must provide supplies and equipment and a safe, secure environment. These requirements are obviously becoming more and more difficult to meet as schools suffer from a variety of destructive acts, ranging from minor malicious mischief to major damage, burglary, arson, and bombings.

Legal procedure has long provided for ways of seeking compensation for wrongs such as damages or losses incurred by one person because of the actions of another. Monetary or other satisfaction has been offered by the injuring party to the injured party under the direction of the law, and if the latter party accepted it, "revenge" was satisfied and the legal procedure completed.[8] With some qualifications, the common law has further always held that minors may be legally responsible for their own torts, including property damage.[9]

It might be assumed, therefore, that school districts have a clear, long-standing precedent to follow in taking legal action against apprehended vandals in order to seek restitution for damages to school property. As has been tersely pointed out, however, minors are "seldom worth suing,"[10] and even when action is taken and fault is established, it is difficult to execute a judgment.

Alternatively, school districts presently have recourse in 46 states to so-called "parental liability" statutes, which, in derogation of common law, impose vicarious liability on parents for the torts of their unemancipated children. While two states (Louisiana, 1804; Hawaii, 1858) have long had such statutes, all the rest were enacted during the 1950's and 1960's as a response to the growing problem of vandalism. Despite the public pressure which forced the passage of such parental liability statutes, however, these laws have been little utilized or tested in the courts by schools. Possible reasons cited for the failure of school districts to take action under such statutes include voluntary restitution made by some parents for damages inflicted by their children, lack of awareness on the part of attorneys that such laws exist,[11] and a hesitancy to hold one party liable for the acts of another, however justified under the law.

Although schools are involved in only some of the statutes and court cases in this area of the law, there is a large body of applicable legal material available to determine the rights of a school district to recover damages from minors and/or their parents. The issues to be examined, then, are the conditions under which a student and/or his parents can be required to make restitution for damages by the student to public school property.

In favor of the question

As Mr. Justice Holmes has succinctly stated, our common law concept of private liability derives from the notions of intent and culpability, and hence

from "blameworthiness," in that liability arises out of conduct which would be blameworthy in "the average man, the man of ordinary intelligence and reasonable prudence."[12] Exceptions to that presumption that every man possesses the capacity to avoid such conduct have also historically been made where a distinct defect renders such a presumption impossible. One writer has noted that at one time this latter category was facetiously said to be composed of "married women, infants, idiots, and lunatics."[13]

Where "infants," or minors, are concerned, the legal problem has been one of striking a just balance between holding the minor only to a standard of "blameworthiness" which he can reasonably be expected to fulfill and yet protecting the interests of those whom his actions may have harmed. As far as these latter interests are concerned, of course, the harmful act of a minor may produce damage just as real as that of an adult, and one compromise solution to the dilemma is to take into full account the characteristics of the minor in the context of the act in question.[14] Thus if the minor is adjudged to be incapable of forming a culpable intention or realizing the probable consequences of his actions, he is relieved from liability, but if, conversely, he is deemed to possess such capacities (or in issues where "fault" is not involved), he is as fully liable as a normal adult.[15]

Since statutes defining "malicious mischief," "vandalism," and other similar forms of property damage typically refer to harm caused by "willful," "wanton," "ruthless," or "malicious" actions which are "intended to damage or destroy" property,[16] the questions of the ability to form an intent and to predict the consequences of an action are immediately relevant. Thus if a minor is to be held liable for damages he inflicts, he must be found to be capable of intentional harm to the property in question.

Courts have typically resorted to chronological age as the basic yardstick by which to measure the capacity of a minor to form intent. Under the English common law, a minor below 8 years of age has generally been exempt from responsibility. A minor between the ages of 8 and 14 has been presumed incapable of intent, but the opportunity to rebut such presumption by evidence to the contrary has been permitted. From the age of 15 to 21, although the minor has usually been free from liability for breach of contract, he would likely be held responsible for his torts.[17] This principle of common law has been upheld in cases in American courts for many years. Children of the ages of 4 years[18] and 5 years[19] have, for example, been held legally incapable of willful, intentional property damage or personal injury, while those up to the age of 14 have sometimes been held blameless[20] and at other times found responsible[21] for their actions. A frequently cited decision involving a 9-year-old clearly delineates the factors to be considered in determining liability for damages on the part of a minor:

A child may be so young as to be manifestly incapable of exercising any of those qualities of attention, intelligence and judgment which are necessary to

enable him to perceive a risk and to realize its unreasonable character. On the other hand, it is obvious that a child who has not yet attained his majority may be as capable as an adult. The standard of conduct of such a child is that which is reasonable to expect of children of like age, intelligence and experience.[22]

From the above considerations, it would certainly appear possible for a school district to bring a civil suit against any minor of 8 years of age or older – which is, as noted earlier, the typical age range for school vandalism – who is believed to be guilty of such property damage. If the minor's ability to form intent can be established, and the execution of the harmful act proved, the school district would very likely be successful in its suit.

However suable by a school district such a minor himself may be, no such cases have been brought into courts of record, probably because of the presumed futility of recovering any damages assessed. Any judgment ordering a minor to make compensation for vandalism would be of real value only if the minor has funds from which any court award could be satisfied. "In a great number of instances, suits, however meritorious, are not filed because the minor is without funds."[23]

This practical consideration is in part responsible for the development of the "family purpose" doctrine, which evolved with the advent of the automobile and accidents involving minor drivers, and, thereafter, the related "parental liability" vandalism statutes. The aim of these two sets of laws is a simple one: they represent "attempts to reach financially solvent defendants."[24]

Under the common law, parents were traditionally not held liable solely on the basis of the parent-child relationship for damages inflicted by their minor children. Typically, courts absolved the parent from liability unless some direct connection existed between the parent's actions and those of the child (*e.g.*, participation in the minor's tort; negligence in permitting or causing the tort to occur; consenting to, ratifying, or benefitting from the tort; standing in another relationship to the child at the time of the tort, such as principal-agent or master-servant). The philosophical basis for considering the parent blameless for the torts of his unemancipated child was the longstanding belief in the fundamental fairness of the position that there should be no liability without fault.

As noted, however, the modern-day problem of the minor driver of the family automobile altered this position in suits involving torts of minors arising from automobile usage. In addition, other complexities of an industrialized society had also caused changes in the fault-liability relationship, including the workmen's compensation laws, bans on the sale of adulterated food, and statutes prohibiting the sale of liquor to minors.

The needs of society, it was realized, required that there be some sacrifice by the individual of his right to be liable only where he was guilty of some wrong. There developed numerous police regulations which were designed to promote the public welfare and which did not require that there be any show-

ing of an act *by the defendant or knowledge on his part which might be a basis for inputing liability under ordinary negligence or criminal principles.*[25]

In such a context, the "parental liability" statutes scarcely represent a novel idea, largely being enacted to combat public harm from a rising tide of juvenile delinquency and vandalism. Although written by various state legislatures, these statutes are generally rather similar in their stipulations. They usually place an absolute limit on parental liability, ranging from $250 to $5000, with a mean of about $750, although in 5 jurisdictions no upper limit is specified. Most apply to all unemancipated minors of a stated age, usually 18, with only a very few setting a lowest applicable age limit (variously stipulated at 7, 10, or 11 years of age). The statutes are about evenly divided as to whether they cover personal injury as well as property damage.[26] Parental liability under these statutes is generally dependent on the establishment of the child's intention to inflict harm and own liability for the damage.[27]

Courts have further ruled that unless the child has been not only legally removed from a parent's custody but also is not in his care at the time of the tort, the parent remains liable for any damages inflicted by his minor child. Even though the "child" may be married, living away from home, and/or is self-supporting, the parent is not relieved of such liability.[28] The fact that the minor has run away from home[29] or has been emancipated by his parent[30] similarly has been held to be irrelevant to parental liability. Even where a minor has briefly returned to the parental home from a court-committed juvenile facility, the parent remains liable, not the state.[31]

Since schools are so frequently the object of vandalism, 11 of the parental liability statutes specifically refer to vicarious liability for a minor's damage to school property, and 15 states hold a minor jointly liable with parents, as well as personally liable.[32] A few states also make it a crime to damage school property and impose fines (up to $100) which a parent must pay if his child damages school property.[33] In one state (Ohio), a court may also require that parents provide a recognizance bond up to $500 upon the adjudication of a child's first offense, with the bond forfeited to any person damaged as a result of a second such act (or to the county treasury), unless the parent can prove that he did attempt – but failed – to inhibit his child's destructive tendencies. This statute "places the burden on the parent to try to change his child's delinquent tendencies at the risk of forfeiture of the recognizance, and at the same time affords compensation to those injured by minors where it can truly be said such injury is partly the parent's fault."[34] In another state without a so-called parental liability law (New Hampshire), a parent can nonetheless be required to pay any fine imposed against his child.[35]

A somewhat special case is presented by Louisiana (and to some extent, by Hawaii), where the earliest of the parental liability laws holds the parent responsible for acts of emancipated children under practically all circumstances. Derived in many respects from French and other continental legal systems

rather than the English common law, the Louisiana law reacts to a *paterfamilias* concept and presumes direct or indirect control by the parents at all times.[36] Age of the minor at fault, for example, is irrelevant in this jurisdiction in establishing intent. Louisiana courts have ruled that "minority is not a tenable defense against liability for damages,"[37] that "even when a child is not of the age of discernment and therefore legally incapable of fault, the parents of the infant are strictly liable for any damages he causes,"[38] and that since an act of a minor child "would have been negligence if he was of discernible age, his parents were liable for his actions."[39] Further, lack of any malicious intent in teenage children is irrelevant, "inasmuch as the intention of a party committing vandalism does not affect the right of recovery...[and] does not exonerate the parent or guardian from liability for his torts."[40] Louisiana law has even held a parent living out of that state and separately from his child liable for that minor's damages: "the father was responsible for the tortious conduct of his minor son, even though the father resided in Mississippi and the son was living and working in Louisiana."[41] Further, since Louisiana is one of the states whose parental liability statute does not set a maximum amount of recovery, "the courts have much discretion to assess damages consistent with all attendant facts and circumstances."[42] The singular requirements of the Louisiana parental responsibility laws, which sometimes appear to conflict with other points of law, have been the subject of two recent thoughtful reviews.[43]

In Pennsylvania, a parental liability law was enacted in 1967, covering both personal injury and property loss or damage willfully caused by a child under the age of 18. It sets a limit of $300 to be paid to any one person, and of $1000 to be paid for any one act or continuous series of acts, regardless of the number of persons suffering damage.[44] The liability of the child must first be determined in an action against him,[45] and liability to the parent may not be separately applied in full to each parent.[46] The statute is included in the Pennsylvania School Code, which further notes that accidental or unintentional breakage is not covered, inasmuch as the statute was aimed at "willful, malicious and wanton acts."[47]

Of further interest has been a series of parental liability cases involving the insurance coverage of the present. In a landmark case in California, *Arenson v. National Automobile and Casualty Insurance Co.*,[48] the insurance company had refused to pay the judgment rendered against an insured parent whose minor son had been found guilty of arson of a Los Angeles school building, on the grounds that since the minor had committed intentional damage, his act came within an exclusion provision of the policy. The state supreme court decided otherwise, however, noting that the insured parent was not personally at fault and stating that, "the policy protects the named insured against liability for intentional injury committed by another insured, and accordingly, it will be unnecessary to consider whether the son's act was in fact intentional."[49] The *Arenson* decision has subsequently been followed in indemnifying insured

parents for acts of their children in non-school cases in New Hampshire[50] and Pennsylvania,[51] as well as in an Ohio school vandalism case.[52] It appears, therefore, that it is quite possible for a parent to insure himself against potential judgments against him under parental liability statutes.

The parental liability statutes have survived constitutional challenges in seven states.[53] Constitutional challenges have ordinarily been made on the grounds that these statutes deprive parents of property without due process and/or deny them equal protection of the laws, both rights guaranteed by the fourteenth amendment.[54] In general, however, "while the courts have held consistently that such liability laws are in derogation of the common law and should be strictly construed, they have likewise been upheld as constitutional, not unreasonable, arbitrary or discriminatory in nature, and in no way depriving parents of their property without due process of law."[55]

The first such challenge came in Texas in 1961, when appellants attacked the constitutionality of the state parental liability law, stating that it was "unreasonable, arbitrary, capricious and discriminatory and particularly discriminates against the defendant and others of his class as to equal protection of the law and is violative of due process of law."[56] The court remarked that the constitutionality of the parental liability laws had never before been under attack in any state, so that no precedental guidelines existed, but also noted that the civil codes of many other countries contained parental liability laws. It ruled that the Texas statute was "not unreasonable and discriminatory and a denial of equal protection and due process of law."[57]

The second challenge to a parental liability statute came two years later in North Carolina and involved a case of school vandalism (arson) perpetrated by an 11-year-old. The parental liability statute was attacked as penal in nature, in derogation of the common law, and in violation of the Fifth Amendment of the Federal Constitution. Noting the existence of the only other test case, from Texas, the court also decided in this case that the statute was "within the police power and not violative of state constitutional provision precluding deprivation of property except by consent or law or Fifth Amendment to Federal Constitution.[58]

In 1967 the Wyoming parental liability statute came under constitutional attack. The court relied on the earlier Texas and North Carolina cases in arriving at its decision in *Mahaney v. Hunter Enterprises*[59] that the Wyoming law was not unconstitutional on grounds that it deprived parents of property without due process or equal protection of law. The court also stated that it was bound "by the fundamental principle that courts will not declare a statute unconstitutional unless the unconstitutionality is clear."[60]

Three tests of the constitutionality of the parental liability statutes reached the courts of three different states during the 1970's, with all three courts relying on the above decisions in ruling that the statutes in question were constitutional. All three courts stated that such statutes were within the police power of

the state, since they struck a balance of the public interest and the individual interest and were a reasonable exercise of the state's concern for the general welfare without being arbitrary or oppressive. In the first of these cases, a Maryland court ruled that parents were not deprived of due process by the exercise of police power over property rights.[61] In Connecticut the parental liability statute was attacked as unconstitutional in that it interfered with "a fundamental constitutional right...the fundamental right to bear and raise children,"[62] with which the court disagreed. In Ohio the parental liability statute was challenged as unconstitutional because it was claimed to be penal in nature and denied due process, but the court ruled that the statute was compensatory, not penal, in nature and noted that due process demands only that laws not be "unreasonable, arbitrary or capricious."[63] The court also relied on the only other Ohio court ruling on this statute (testing whether separate liability arose from the actions of each of several minor children of the same parent) in arriving at its decision.[64]

The most recent test of the constitutionality of a state parental liability statute arose in New Jersey. The New Jersey parental liability laws have had a chequered history. Under the existing legislation which imposed unlimited liability specifically on parents of public school students,[65] a landmark case was successfully prosecuted in 1959 and has been quoted in the literature for years. In that case, *Board of Education of Palmyra v. Hansen*,[66] the parents of a high school student who entered his school at night to secure examination papers and then set fire to the school were held liable. The court ruled that the statute was not unconstitutional on any of the several grounds cited (deprivation of property without due process, unfair as imposing liability on parents who are free from fault, not expressing the objective of imposing liability as a law which was a revision and compilation). The court further held that the statute applied after school hours as well as during school hours, and it commented that those who did not wish to accept the statutory liability imposed in sending a child to public school could choose instead to send him to a private school.

In 1978, however, the revised New Jersey parental liability statute[67] was declared unconstitutional and void and the decision of the *Palmyra* case openly criticized. In *Board of Education of Piscataway Township v. Caffiero*,[68] when the school board attempted to recover costs of extensive damage done to a high school by adolescent students, the court ruled against it. The court stated that since not every parent can afford to send his child to a private school, and since school attendance is compulsory in New Jersey for children between the ages of 6 and 16 years, the law was unconstitutional because it discriminated against this class of parents. The court further stated that the unlimited liability of a parent could not withstand constitutional attack, since it deprived a parent of due process of law solely on the basis of the parent-child relationship.

In 1979, the New Jersey legislature formally amended the law within which this parental liability provision had been included, eliminating entirely the

section entitled, "Liability of parents of pupils for damage to property" of a public school.[69] However, in January 1980, the state legislature also amended the statute dealing with the liability of parents of non-public school students, eliminating its previous limit (formerly, $250) and applying it to parents of all minors.[70]

In April 1980, a further appeal of the *Piscataway* case was heard, in a consolidated ruling which included a case of arson by a student in a Roselle school. The court overturned the earlier *Piscataway* ruling, although it agreed with the argument that not every parent could afford to send his child to private school. The court stated that the statute in question was "clearly constitutional and we discern no sound reason for holding otherwise merely because it places no dollar amount on liability."[71] It further stated that the law did not deprive parents of due process or equal protection of the law and that imposing vicarious liability on parents for the acts of minors resulting in damage to school property is an entirely reasonable means to achieve essential state purposes of compensating innocent victims (here, the taxpaying public) and of attempting to deter juvenile delinquency. The court alluded to the revision of New Jersey law which now applies parental liability equally to public and non-public school students, so that the question of inequity in liability of two classes of parents is now presumably resolved.

Against the question

Courts have long been in agreement in holding that school boards may not require pupils or their parents to pay for injury to school property where the injury grows out of neglect or carelessness[72] or for property which is accidentally destroyed.[73] Three very early cases set a precedent which still stands. One hundred years ago, in the very first case which was brought to a court of record involving damage by a student to school property, a 12-year-old boy who broke a window accidentally while playing ball was excluded from school until he or his parents paid for the damage, which they refused to do. The Iowa court involved ruled that the school board had no authority to enforce such a rule for payment or suspension.[74] In Indiana, the state supreme court stated that "a rule requiring pupils to pay for school property which they may wantonly and carelessly break or destroy, is not a reasonable rule...[a]...the 'wanton and careless destruction,' etc., amounts to nothing more than carelessness."[75] In Michigan, the case of a 10-year-old boy who accidentally broke another school window reached that state's Supreme Court and was similarly dealt with: Since the window was broken "carelessly and negligently," rather than in a "malicious and willful" manner, the court ordered his suspension from school revoked, without requiring the $1 restitution involved.[76] From these earliest days, the courts have agreed that "a rule of the board of education which requires pupils to pay for carelessly inflicted damages to school property is unreasonable."[77]

The modern parental liability statutes have been rather similarly construed by the courts. As noted earlier, most of these state statutes (with Louisiana the notable exception) apply only when the minor's intent to inflict damage can clearly be established, with the burden of proof on the plaintiff. Thus if lack of intent is deemed to be present, the parent is held free from liability. In Michigan, for example, no recovery under that state's parental liability law was possible in a case in which the court ruled that the 17-year-old girl involved had not engaged in "malicious damage."[78] In Connecticut, a similar ruling was made when the acts of the adolescent boy in the case were deemed "not willful or malicious."[79] In Colorado, the parent of another adolescent boy was held free from liability by that state's Supreme Court, "absent any indication that he intentionally damaged the property without just cause, or that he was motivated by a mischievous purpose, a design to injure, or any ill will."[80]

Ability of the parent to pay has sometimes been taken into account, even in Louisiana. There a court of appeal noted that it was influenced by the trial judge's appraisal of the ability of the parent to respond to judgment, even though "the facts warrant a much larger increase than we have decided to award."[81] In a Texas school case, parents were held liable for arson of a school building committed by their adolescent son, but as the school district had an acknowledged policy of taking a parent's inability to pay into account in deciding whether to require restitution for vandalism and yet had not done so for this very economically deprived family, the court upheld an injunction against school officials, in effect no longer requiring the parent to pay for their son's vandalism.[82]

As emphasized by one reviewer, "[i]n order to impose liability on the parents for their child's damage to property, the circumstances must bring the case within the terms of the statute imposing such liability,"[83] which terms have often been construed quite literally by the courts. A frequently cited South Dakota case clearly illustrates such strict construction. Here a court ruled against the school district and held parents from liability for their 16-year-old son's school vandalism because of pecularities in the wording of that state's parental liability statute.[84] As noted by the court, the South Dakota law stipulated that parents or guardians of a pupil damaging school property are liable "on the complaint of the teacher."[85] However, the vandalism was inflicted about midnight, when no teacher was in the building. While it commented on the rather archaic school situation referred to by the statute, the court decided not to extend its own construction of the act any further than the exact wording indicated, in the belief that the legislature may have intended that parental liability should exist only for damages inflicted by a child when under the direct supervision of the teacher.

There are a variety of other circumstances in which parental liability cannot be enforced. Occasionally this had occurred because an incorrect party has been sued, in the mistaken belief that he/it is in actuality the "parent." A

stepfather, for example, was held immune from such suit.[86] A state agency to which a minor was committed was also not liable as a "parent."[87] Vandalism committed in Kansas by a 16-year-old girl who resided with her parents in Oklahoma was not subject to parental liability.[88] In Florida, parents of an emancipated "child," a 20-year-old, were held not liable for his tort, as he was not otherwise alleged to be "dependent, insane, or mentally deficient."[89] In New York, a state without a specific parental liability statute, a school district lost its suit against parents to recover damages caused by their minor son. The state supreme court held that there was no parental liability because there was no evidence that parents had had prior knowledge of the child's "propensity toward vicious conduct imperilling others."[90]

In one state, Georgia, a parental liability statute was found to be unconstitutional, and the law has had a troubled course both before and after that decision. The original Georgia statute, passed in 1956, provided for parental liability for the "willful and wanton acts of vandalism" of minor children under parents' custody and control.[91] The first constitutional challenge to the statute was not answered by the court, as it was raised in a personal injury suit involving a 13-year-old boy who was not accused of "vandalism," with the court stating its position that it would "not pass upon an attack on the constitutionality of a legislative act, made by parties whose rights it does not affect, and who therefore have no interest in defeating it."[92] In 1966, the legislature then deleted the word "vandalism" from the statute and extended coverage to personal injuries and liability to persons *in loco parentis*.[93] The 1966 statute was subsequently ruled constitutional in a 1969 case of personal injury heard in a trial court but not appealed.[94] In 1971, however, a case of personal injury caused by a 12-year-old boy reached the Georgia Supreme Court in *Corley v. Lewless*.[95] Here the court ruled that the parental liability statute was unconstitutional, reasoning that the Georgia law was not penal but compensatory in nature and violated the due process clauses of both the state constitution and the fourteenth amendment of the Federal Constitution because it "imposes vicarious tort liability solely on the basis of the parent-child relationship."[96] The court held that this compensatory feature of the Georgia law distinguished it from those of the other states in which a parental liability statute had been found to be constitutional.[97]

The court's reasoning and decision in *Corley* have been the subject of much controversy, especially as they contradict findings in all other states in which the constitutionality of the parental liability statutes has been tested. One outspoken critic simply labeled the decision as incorrect, stating flatly that the statute "should have been held valid under the prevailing constitutional tests."[98] Another critic has noted that "the Georgia courts have traditionally taken a strict view toward statutes imposing liability without fault,"[99] pointing out that the *Corley* court "undiscerningly" relied on the precedent of three earlier Georgia cases in which other absolute liability statutes had been held

unconstitutional, and opining that it is irrelevant to constitutionality whether a statute is "penal" or "compensatory" in nature, since liability without fault is imposed in either case.[100] Still another writer, in raising the same point, noted that the reasoning of the Georgia court would by implication impugn the constitutionality of the parental liability statutes of states such as Louisiana and Hawaii, which are clearly meant to be compensatory in nature.[101]

In Pennsylvania, a rather peculiar situation has been created with regard to restitution for damages by minors, because of the state's juvenile code, despite revisions over the years. In general throughout the United States, while minors may be held civilly liable for their torts, as discussed earlier a juvenile court has no authority to deal with the issue of parental liability, having at best rather limited authority over parents. "Juvenile courts cannot, without enabling legislation, render a civil judgment against parents for persons seeking damages for wrongs committed by minors. Juvenile courts may, however, order restitution to a victim, as a term of a minor's probation."[102] In Pennsylvania, however, courts have clearly held otherwise.

Given the idea that the primary purpose of the juvenile court is to act *parens patriae* in what would otherwise be a criminal case, emphasis has been placed on rehabilitating the juvenile offender. In Pennsylvania, this interpretation of the juvenile court acts has resulted in "a persistent refusal to permit jurisdiction over suits concerning money damages."[103] As early as 1942, the Pennsylvania Superior Court ruled that a requirement of a lower court that a 17-year-old boy make regular payments of $10 per week in restitution for injuries he caused was "not a function of the juvenile court and is entirely outside of its jurisdiction."[104] In 1954, the state superior court reaffirmed this position that the juvenile court may not, even at its own behest, involve itself in ordering monetary payments, when the parent of a delinquent child had been ordered by a lower court to make restitution.[105]

However, a part of the Pennsylvania parental liability statute, passed in 1967, addresses itself to this issue:

> *In any proceeding of a criminal nature against a child under the age of eighteen years and in any proceeding against a child in a juvenile court, the court shall ascertain the amount sufficient to fully reimburse any person who has suffered injury to the person, or theft, destruction or loss of property because of the willful, tortious act of the child, and direct the parents to make payment in the amount not to exceed the limitations set forth in section 4 hereof. If the parents fail to comply with the direction of the court, the amount may be recovered in an action of assumpsit against the parents of either of them.*[106]

In some subsequent cases involving adjudication of delinquency and questions of restitution, Pennsylvania courts have clearly been cognizant of both the juvenile court acts and the parental liability statute, ruling that the minor involved cannot be required by a juvenile court to pay for damages, fines, or

court costs, but referring to parental liability under that statute.[107] In still other cases at the same court level and of about the same vintage, the court has ruled only that a juvenile court may not require a delinquent to make any sort of payment and have not alluded to the complementary parental liability statutes.[108] The confusion resulting from the provisions of the juvenile code, permitting only several possible dispositions not including any sort of monetary payment, of an adjudicated delinquent (treatment as a deprived child, probation, committment to a public institution) with the inclusion in the parental liability act of possible actions for restitution against parents in a juvenile court has been addressed in one court decision[109] and one law review, which also considered the constitutional issues concerning the status of parents in a juvenile court and its highly questionable authority over them.[110]

In two Pennsylvania cases involving extensive school vandalism, one of arson of a school building[111] and one of breaking in and damaging school property,[112] the issue of parent liability was not raised at all. Still, in *In re Dull*[113] other parents were held not liable for damage when their son committed a "willful and malicious tort" after escaping from an institution to which he had been committed as delinquent.

To say the least, in Pennsylvania the issue of whether a minor of the age of discretion may be held responsible for his own torts and/or whether his parents may be liable for damages he inflicts is a confused one. There exists, for example, the possibility that a child not adjudicated a delinquent may be held liable, while a proven delinquent may be held immune from such requirement for restitution. Similarly, the Pennsylvania parental liability statute may, strictly speaking, not be enforceable by a juvenile court, on constitutional grounds, although this question has yet to be directly considered by the courts. Thus the condition might arise that a parent whose child had been adjudicated delinquent (as indeed the case in *Dull*)[114] will not be liable, while a parent of a non-delinquent child, sued successfully in civil court, would be held liable. In addition, it appears that the issue of parental responsibility, clearly provided for in the parental liability statute, has sometimes simply not been raised in cases of major school vandalism.

In closing, it should of course be noted that in four of the 50 states there exist no parental liability statutes: Mississippi, New Hampshire, New York, and Utah. Any court action by a school district or other party in any of these four states to recover damages caused by a minor's vandalism would necessarily be limited to a suit against the minor himself. As previously observed, however, such actions are typically of little value to the injured party, as minors ordinarily are without sufficient funds to pay any possible judgment rendered against them.

The decision

The question of whether a student and/or his parents can be required to make

restitution for damages by the student to public school property can broadly be answered in the affirmative. However, as evident from the preceding review of the issues involved, there are a number of qualifications to be placed on such affirmation.

To begin with, aside from the necessity of first establishing the student's responsibility for the damage, the manner in which the damage has been incurred must be taken into account – *viz.*, whether it was inflicted in an accidental or an intentional manner. With the exception of the state of Louisiana, in order for restitution to be ordered by the courts, from either the minor and/or his parents, it is necessary to establish that the damage to school property was inflicted in a willful, malicious manner. Again with the exception of Louisiana, the age of the student is an issue. If he is 7 years of age or younger, liability would probably not be found, on the basis of an inability to form an intent. If the age of the student falls between 8 and 14 years the plaintiff school district would have the opportunity to present evidence that he was capable of performing intentionally harmful acts. From ages 15 to 18 years, if fault is found, the minor would probably be held liable. The establishment of fault would of course be necessary in any suit directed at the minor, but also would be required (except in Louisiana) in order to seek restitution under a given state's parental liability statute, as the minor's liability must first be established before vicarious liability can be imposed on the parent under these laws.

Further, vicarious parental liability statutes exist in 46 states; no recovery would be possible in Mississippi, New Hampshire, New York, and Utah. In addition, in order to pursue a successful suit in any of the 46 states with such laws, it is obvious that a situation must exist which exactly fits the specific provisions of the statute. "When the child is the aggressor in a tortious situation, the parent is not automatically deemed liable as an insurer of the child's behavior. The question becomes under what circumstances will the parent be judged liable for the child's act."[115]

The question of exactly who is a "parent" and under what circumstances the parent is held responsible for the control and/or custody of the child has been a muddled issue because of the language of some of the statutes. One state (Texas) attempted to resolve this issue by revising its parental liability statute to define a "parent" broadly as being any "managing conservator" – *i.e.*, any person having a *duty* of control and reasonable discipline over the child.[116]

Even if a minor and/or parents are held liable, however, the "restitution" ordered may be more apparent than real, constituting the proverbial "drop in the bucket" toward actual restitution of loss. Frequently, acts of school vandalism result in very expensive damage to schools, particularly in arson cases, where many thousands or even hundreds of thousands of dollars may be involved.[117] To recover damages which cover even a sizable portion of the losses in cases of extensive vandalism is scarcely practical from parent and/or

child. In Seattle, where a policy of vigorous prosecution of vandals and their parents has been actively pursued by the school district, a restitution rate of about 8% of vandalism losses was recently reported.[118] The recovery limits on individual acts of vandalism, as noted earlier, average about $700 among the various state parental liability statutes which specify a "cap," but even in states where no statutory limit of liability is imposed, it is unlikely that total damages actually can be recovered if extensive damage is involved. Further, the ability of the parent (or minor) to pay may be taken into account by the court, so that a lesser award (or even no award) may be set by the court.

As a corollary, if the statutes with a relatively high dollar limit (or no limit) on parental liability are considered by the court to be punitive, the relative worth of the defendant will be considered, which will not be the case if the court considers that compensatory damages are involved.[119]

The peculiar issue existing in Pennsylvania with contradictory provisions of the state's juvenile code and the parental liability statute has been mentioned. Clearly, if a school district wishes to seek restitution directly from a minor, it should not claim that he is a "delinquent" but should institute a civil suit against him, since if a court sits as a juvenile court on the case, it cannot order him to make restitution. Going through a juvenile court proceeding in order to establish parental liability may also be a risky business for a school district, as serious issues of constitutionality might be raised by the parent in terms of the juvenile court's highly questionable jurisdiction over an adult. The inclusion of the "juvenile court" provision in the Pennsylvania parental liability statute has caused one reviewer to criticize the act openly as "a bad statute...of dubious constitutionality."[120]

A clearly crucial issue as to whether a student and/or his parents can be required to make restitution for vandalism is the activity of the school district under the law. While a minor or his parents may make voluntary restitution, unless a school district sues, it cannot force restitution. Various modern programs for vandalism control urge as a vital part of the "total push" needed in this area that school districts take quick and consistent legal action.[121] Los Angeles' "Prevent School Vandalism Project" also involves making well known to the community the fact that parents of school vandals *will* be prosecuted and the juvenile court there has announced that it will aid schools in filing such suits by advising them how to proceed.[122] As has been further noted, the "pay-off" in restitution cases is not only recovering at least partial damages but also prevention of future ones, as "by dogging parents hard, you upset them enough to put pressure on their kids to behave in the future."[123]

However, this review of the literature suggests that school districts are largely not utilizing the legal remedies open to them in seeking restitution for vandalism. As noted by another earlier review, the parental liability laws are "going unused," and efforts to provide this corrective technique "have been wasted if the law is not actively applied."[124] One authority on vandalism has

pointed out that with damages over $600 million annually, "vandalism is a crime and not a prank,"[125] and urges that schools aggressively pursue parental liability, taking the initiative in suits and appeals, regaining the authority eroded by the courts in the current era of emphasis on individual rights by being an assertive, articulate plaintiff.[126] Local ordinances are also recommended as a weapon against vandalism.

> *Local ordinances covering vandalism, theft, and disruptive intruders in the schools can be legislated very quickly and very successfully. And prosecution under these local ordinances can usually be conducted within one month. Most criminal justice experts agree swift prosecution and certainty of punishment is an effective deterrent.*[127]

A final point to be raised is the fact that the basic constitutional issue in imposing vicarious liability upon a parent has never been dealt with by the United States Supreme Court, and, in the opinions of a good many reviewers, has been addressed only fairly superficially by the various state courts in which it has been tested. The American Bar Association has pointed out that the hesitancy to apply these laws[128] and the ambivalence of state legislatures in writing statutes which are neither clearly punitive nor clearly compensatory in nature[129] are symptoms of confusion of purpose.

> *One would think that the lawmakers would either retain the common law rules or provide truly effective remedies to replace them. But perhaps this is too easy an answer. It proceeds on the assumption that either there should be full parental responsibility for the torts of a minor or there should be none. Neither the courts nor the legislatures in this country have been willing to accept either alternative completely.*[130]

Some authorities argue that the parental liability laws are, as attacked by one critic, "contrary both to common law doctrines and constitutional principles."[131] However, while courts will ordinarily follow precedent as in the body of common law in the absence of a statute, where statutory law has been created, it supersedes common law practice. "Where the legislature by statute moves in on territory occupied by precedent, the statute prevails."[132] In such a context, the argument that the parental liability statutes are contrary to common law is meaningless.

The question of whether the parental liability statutes could withstand a serious attack on their constitutionality is a more vital issue. If, as stated by the Supreme Court, "[t]he fundamental requisite of due process of law is the opportunity to be heard,"[133] cases involving parental liability do meet this standard. The Supreme Court has also ruled that "liability without fault is not a novelty in the law. . . . Statutes imposing liability without fault have been sustained."[134] Parental liability statutes also seem to be within the Supreme Court's requirement that due process "demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[135] It appears,

then, that the parental liability statutes probably do meet the "rational basis test" for constitutionality under the due process clause of the fourteenth amendment, since these laws do have the rational purposes of reducing juvenile delinquency and vandalism and of compensating victims, and since there is a reasonable relationship between these purposes and the group (*i.e.*, parents of vandals) which they classify.

Whether parental liability laws could pass the "strict scrutiny test"[136] of constitutionality under the due process clause is probably a more questionable issue. Here the decision as to whether a compelling state interest is served would no doubt be influenced by the prevailing social and legal climate of the day. However, nowadays there is increasing state interest in minors; many changes are occurring in traditional family structure, and major alterations in the sophistication and behavior of minors are clearly observable. "Infants just are not infants any longer,"[137] and juvenile crime, of which vandalism is a major aspect, may now well be regarded as a very compelling state interest indeed.

Thus far, at least, the United States Supreme Court has yet to be presented with a petition for *certiorari* relating to the constitutionality of the parental liability laws.[138] At present it appears that it is also not likely to be asked this question,[139] at the cost of pursuing such an appeal probably would far exceed the amounts awarded in most parental liability suits, so that the various states may have to continue to deal with issues raised by such statutes without the benefit of Supreme Court guidelines.[140]

In any event, whether these statutes are entirely "fair" in imposing vicarious liability upon parents, it would certainly be less fair simply to impose "liability" on innocent victims and/or on the taxpaying public.[141] Basically, such statutes may be regarded as an expression of the conscience of society. "It is believed that responsible parents normally feel a moral obligation to pay for damages caused by their children, and that what responsible people consider to be a moral obligation is generally a good guide for determining what our legal responsibilities should be."[142]

Since significant recovery from the minor vandal himself is not really possible, vicarious liability for restitution necessarily is always imposed on someone else. It certainly seems that his parent is a more reasonable surrogate than the victim or the public at large.

Endnotes

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3. *School Crime*, 41 Educ. Dig. 36, 37 (1975).
4. Hathaway & Edwards, *How to (Just About) Vandal-proof Every School in Your District*, 159 Amer. Sch. Bd. J. 31 (1972).

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6. Howard, *Factors in School Vandalism*, 11 J. Res. Devel. Educ. 53 (1978).
7. Phay, *The Law of Suspension and Expulsion: An Examination of the Substantive Issues in Controlling Student Conduct*, NOLPE, 37 (1975).
8. S. Schafer, "Compensation and Restitution to Victims of Crime" 5 (1970).
9. W. Prosser, "Handbook of the Law of Torts" 26 (1971).
10. Alexander, *Tort Responsibility of Parents and Teachers for Damage Caused by Children*, 16 U. Tor. L.J. 165 (1965).
11. *Id.* at 171.
12. O. Holmes, "The Common Law" 4 (1923).
13. Stone, *Liability for Damage Caused by Minors: A Comparative Study*, 5 Ala. L. R. 1 (1952).
14. *Id.* at 4-5.
15. *Id.* at 25.
16. 44 W. & P. 113-114.
17. Stone, *supra* note 13, at 24.
18. *Connors v. Pantano*, 165 Neb. 515, 86 N.W.2d 367 (1957).
19. *Walker v. Kelly*, 6 Conn.Cir.Ct. 715, 314 A.2d 785 (1973).
20. *State v. Yeargan*, 117 N.C. 706, 23 S.E. 153 (1895).
21. *Kuhns v. Brugger*, 390 Pa. 331, 135 A.2d 395 (1957); *Brown v. Dellinger*, 355 S.W.2d 742 (Tex. Civ. App. 1962).
22. *Lutteman v. Martin*, 20 Conn.Supp. 371, 135 A.2d 600, 602-603 (1957).
23. Stone, *supra* note 13, at 5-6.
24. *Id.* at 6.
25. Note, *A Constitutional Caveat on the Vicarious Liability of Parents*, 42 Notre Dame L. 1321, 1327 (1972).
26. Note, *The Iowa Parental Responsibility Act*, 55 Iowa L. Rev. 1037, 1037-38 (1970).
27. *Lutteman v. Martin*, *supra* note 22; *City of Milford v. Swarbrick*, 24 Conn. Supp. 320, 190 A.2d 493 (1963); *Repko v. Seriani*, 3 Conn. Cir. Ct. 374, 214 A.2d 843 (1965).
28. *Albert v. Ellis*, 359 N.E.2d 1033 (Ohio C. P., 1977).
29. *Repko v. Seriani*, 3 Conn.Cir.Ct. 372, 214 A.2d 843 (1965).
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31. *Gillespie v. Gallant*, 24 Conn. Supp. 357, 190 A.2d 607 (1963); *Potomac Insurance Company v. Torres*, 75 N.M. 129, 401 P.2d 308 (1965).
32. Severino, *Who Pays - or Should Pay When Young Vandals Smash Things Up in Your Schools?* 159 Amer. Sch. Bd. J. 33, 34 (1972).
33. Comment, *Parent and Child - Civil Responsibility of Parents for the Torts of Children - Statutory Imposition of Strict Liability*, 3 Vill. L. Rev. 529, 535-36 (1958).
34. *Id.* at 538-39.
35. *Id.* at 539.
36. Annotation, *Validity and Construction of Statutes Making Parents Liable for Torts Committed by Their Minor Children*, 8 ALR 3d 612, 615, 617-24 (1966).
37. *Smith v. Freeman*, 31 So.2d 524 (La.App., 1947).
38. *Turner v. Bucher*, 308 So.2d 270 (La.S.Ct., 1975).
39. *Richard v. Boudreaux*, 347 So.2d 1298 (La.App., 1977).
40. *Hayward v. Carraway*, 180 So.2d 758 (La.App., 1965).
41. *Watkins v. Cupit*, 130 So.2d 720 (La.App., 1961).
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43. Note, *Tort - Damage Caused by Minors under the Age of Discretion - Strict*

Vicarious Liability Imposed on Parents, 49 Tul.L.Rev. 1194 (1975); Note, Torts - *Strict Liability for Damage Caused by Infants*, 21 Loy.L.Rev. 1019 (1975).

44. Pa. Stat. Ann. § 11-2001-2005 (Supp. 1967).
45. *Trotto v. Dourlein*, 121 P.L.J. 80 (Pa., 1973); *Hardesty v. Fisher*, 75 Pa.D.&C.2d 379 (1976).
46. *Windish v. Watts*, 9 Pa.D.&C.3d (1979).
47. Pa. School Law, 1, 181.04.
48. 45 Cal.2d 81, 286 P.2d 816 (1955).
49. 45 Cal. at 83, 286 P.2d at 818.
50. *Pawtucket Mutual Insurance Company v. Lebrecht*, 104 N.H. 465, 190 A.2d 420 (1963).
51. *Esmond v. Liscio*, 209 Pa.Super. 200, 224 A.2d 793 (1967).
52. Laven, *Liability of Parents for the Willful Torts of Their Children under Ohio Revised Code Section 3109.09*, 24 Cleve. St. L. Rev. 1, 14-16 (1975).
53. As discussed in the following section, only in one state has such a law been voided as unconstitutional without further appeal, and in that state the law was altered so as to be unobjectionable constitutionally.
54. U.S. Const. amend. XIV, § 1.
55. Severino, *supra* note 32.
56. *Kelly v. Williams*, 346 S.W.2d 434, 436 (Tex. Civ. App., 1961).
57. *Id.* at 434.
58. *General Insurance Company of America v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645, 646 (1963).
59. 426 P.2d 442 (Wyo. S. Ct., 1967).
60. *Id.* at 444.
61. *In re Sorrell*, 20 Md.App. 179, 315 A.2d 110 (1974).
62. *Watson v. Gradzik*, 34 Conn.Supp. 7, 373 A.2d 191, 192 (1977).
63. *Rudnay v. Corbett*, 53 Ohio App.2d 311, 374 N.E.2d 171, 174 (1977).
64. *Lewis v. Martin*, 16 Ohio Misc. 18, 240 N.E.2d 913 (1968).
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68. *Board of Education of Piscataway Township v. Caffiero*, 159 N.J.Super. 347, 387 A.2d 1263 (1978).
69. 5 N.J. Sess. Laws '79-3 at 719, N.J. Stat. Ann. §§ 18A: 37-1, 37-2.
70. N.J. Stat. Ann. §§ 2A:53A-15 (amended Jan. 18, 1980).
71. *Board of Education of Piscataway Township v. Caffiero* (A-4739-77); *Board of Education of the Borough of Roselle v. Monagas* (A-829-78), N.J. Super. App. Div. (decided April 1, 1980).
72. N. Edwards, "The Courts and the Public Schools" 570 (1955).
73. L. J. Patterson *et al.*, "The Law and Public School Operation" 424 (1969).
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75. *State v. Vanderbilt*, 116 Ind. 11, 18 N.E. 266 (1888).
76. *Holman v. School Trustees of Avon*, 77 Mich. 605, 43 N.W. 996 (1889).
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79. *Town of Groton v. Medberry*, 6 Conn. Cir. Ct. 671, 301 A.2d 270 (1972).
80. *Crum v. Groce*, 556 P.2d 1223 (Colo. S. Ct., 1976).
81. *Smith v. Freeman*, 131 So.2d 524 (La. App., 1947).
82. *Allen v. Chacon*, 449 S.W.2d 289 (Tex. Civ. App., 1969).
83. Annotation, *Parents' Liability for Injury or Damage Intentionally Inflicted by Minor Child*, 54 ALR 3d 974, 1023 (1973).

84. *Lamro Independent Consolidated School District No. 29 of Tripp County v. Cawthorne*, 73 N.W.2d 337 (S.D. S. Ct., 1955).
85. *Id.*
86. *Landers v. Medford*, 108 Ga.App. 525, 133 S.E.2d 403 (1963).
87. *Hahn v. Brown*, 51 Ohio App.2d 177, 367 N.E.2d 884 (1976).
88. *Memorial Lawn Cemetaries Association, Inc., v. Carr*, 540 P.2d 1156 (Okla. S. Ct., 1975).
89. *Thorne v. Ramirez, 346 So.2d 121, 122 (Fla. App., 1977).*
90. *Massapequa Free School District No. 23 v. Regan*, 63 A.D.2d 727, 405 N.Y.S.2d 308 (1978).
91. Ga. Laws 699, no. 421 (1956).
92. *Vort v. Westbrook*, 221 Ga. 39, 142 S.E.2d 813, 815 (1965).
93. Ga. Laws 424, no. 514 (1966); Ga. Code Ann. §§ 105-113 (1968).
94. *Gilbert v. Floyd*, 119 Ga.App. 670, 168 S.E.2d 607 (1969).
95. 227 Ga. 745, 182 S.E.2d 766 (1971).
96. *Id.* at 770.
97. The Georgia legislature has since placed a $500 limit on the state's parental liability act. Ga. Code Ann. §§ 105-113 (1976).
98. Note, *Constitutional Law - Due Process - Parent Tort Liability Solely on Basis of Parent-Child Relation Held Unconstitutional*, 23 Mercer L. Rev. 681, 689 (1972).
99. Note, *Constitutional Law - Parent Liability Statute Held Unconstitutional*, 9 Ga. St. Bar J. 129, 131 (1972).
100. *Id.* at 133.
101. Note, *Torts: The Constitutional Validity of Parental Liability*, 55 Marq. L. Rev. 584, 588 (1972).
102. Freer, *Parental Liability for Torts of Children*, 53 Ky. L.J. 254, 255 (1965).
103. Note, *The Pennsylvania Parental Liability Statute*, 29 U. Pitt. L. Rev. 578, 587 (1968).
104. *In re Trignani*, 148 Pa.Super. 142, 24 A.2d 743, 744-45 (1942).
105. *In re Weiner*, 176 Pa.Super. 255, 106 A.2d 915 (1954).
106. Pa. Stat. Ann. § 11-2003 (Supp. 1967).
107. *Swartz v. Wesler*, 66 D.&C.2d 350 (Pa. 1974); *In re Bollinger*, 237 Pa.Super. 252, 352 A.2d 118 (1975); *In Interest of Evans*, 371 A.2d 914 (Pa.Super., 1977); *In re Garman*, 378 A.2d 449 (Pa.Super., 1977); *In Interest of Gonazalez*, 386 A.2d 586 (Pa.Super., 1978); *In Interest of Carroll*, 393 A.2d 993 (Pa.Super., 1978).
108. *In re Gardini*, 365 A.2d 1252 (Pa.Super., 1976); *In Interest of Frey*, 375 A.2d 118 (Pa.Super., 1977); *In re Rudy; In re Sipes*, 378 A.2d 1019 (Pa.Super., 1977).
109. *In Interest of Gonzalez*, 386 A.2d 586 (Pa.Super., 1978).
110. Note, *The Pennsylvania Parental Liability Statute*, *supra* note 103.
111. Kovach Appeal, 70 D.&C.2d 762 (Pa., 1974).
112. *Rudi v. Big Beaver Falls Area School District*, 74 D.&C.2d 790 (Pa., 1976).
113. *In re Dull*, 75 D.&C.2d 241 (Pa., 1975).
114. *Id.*
115. Frankel, *Parental Liability for a Child's Tortious Acts*, 81 Dick. L. Rev. 755 (1977).
116. Adams, *Has the Family Code Made Any Changes in the Liability of a Parent for His Child's Conduct?* 26 Bay. L. Rev. 687, 689 (1974).
117. Damage in the *Palmyra* school fire, *supra* note 67, was $344,000 in *1959*.
118. Smith, *School Security and the Rights of Juveniles*, speech presented at Conf. of National Association of School Security Directors, Seattle, Wash., July 15, 1975; Property loss and damage in the 1973-74 FY amounted to $200,550; restitution and recovery efforts for that period yielded $15,779, for a net loss of $184,771.

119. Note, *Torts: The Constitutional Validity of Parental Liability*, *supra* note 102.
120. Speck, *Parental Responsibility Laws Reviewed*, 19 Juv. Ct. Judges J. 90, 94 (1968).
121. Nolpe, "Frontiers of School Law" 207 (1973); L. B. Patterson, A Prosecutor's Handbook For School Administrators 121 (1975); Irwin, *Vandalism – Its Prevention and Control,' supra* note 2; Richardson, *Combating Vandalism in the Schools*, 60 NAASP Bull 60, 63 (1976); Sexton, *If Your Schools Aren't Using the Procedures Listed Here, You're Vulnerable to Vandals*, 166 Amer. Sch. Bd. J. 38 (1979).
122. *Vandalism*, 92 Nation's Sch. 31, 37 (1973); Sabatino *et al.*, *Destructive Norm-Violating School Behavior among Adolescents*, 13 Adol. 675, 683 (1978).
123. *Vandalism*, *supra* note 122, at 35.
124. Colmey & Valentine, *Stop Vandalism with Parent Responsibility Laws*, 141 Sch. Bd. J. 9, 11 (1960).
125. L. B. Patterson, *The Principal, the Student, and the Law: A Prosecuting Attorney's View*, speech presented at NASSP Conf., Wash., D.C., Feb. 16, 1976).
126. *Id.*
127. *Id.*
128. Kenny & Kenny, *Shall We Punish Parents?* 47 Amer. Bar Assn. J. 804 (1961).
129. Nutting, *Parents and Their Children's Torts: Legislative Solutions*, 50 Amer. Bar Assn. J. 882.
130. *Id.* at 883.
131. Note, *A Constitutional Caveat on the Vicarious Liability of Parents*, *supra* note 25 at 1334.
132. C. Post, "An Introduction to the Law" 68 (1963).
133. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 657 (1950).
134. *New York Central Railroad v. White*, 243 U.S. 188, 253 (1917).
135. *Nebbia v. New York*, 291 U.S. 502, 525 (1934).
136. Legislation regulating or limiting a fundamental civil liberty is subject to this heightened standard of review under the due process clause. In order to be constitutional, the law must be necessary to promote a compelling governmental interest.
137. Stone, *Liability for Damage Caused by Minors: A Comparative Study*, *supra* note 13 at 33.
138. Kent, *Parental Liability for the Torts of Children*, 50 Conn. Bar J. 452, 476 (1976).
139. While this article was at press, New Jersey parents did appeal to the U.S. Supreme Court a state supreme court ruling that they were liable for such damages, contending that the law violated their fourteenth amendment rights; the Court, however, let the state court ruling stand by dismissing the appeal "for want of a substantial federal question," so that a state parental liability statute has now withstood at least this first test of federal constitutionality. [*Caffiero v. Board of Education of Piscataway Township*, 102 S.C. 560 (1981)].
140. Comment, *Parental Liability for Willful and Malicious Acts of Children*, 36 Wash. L. Rev. 327, 330 (1961).
141. Comment, *Parent and Child – Civil Responsibility of Parents for the Torts of Children – Statutory Imposition of Strict Liability*, *supra* note 33 at 530; Annotation, *Validity and Construction of Statutes Making Parents Liable for Torts Committed by Their Minor Children*, *supra* note 36 at 615; Longnaker, *The Liability of the Parent for the Tort of the Child*, 28 U. K. C. L. Rev. 183, 187 (1960).
142. Comment, *Statutory Comment: Parental Responsibility Statute*, 40 N. C. L. Rev. 619, 623 (1962).

Toward a model parental liability act

Dana E. Prescott and Cynthia L. Kundin

Public dissatisfaction with the failure of the juvenile justice system to protect the public from harm to person and property has prompted legal scholars, judges, police, lawyers, and correctional officers to reexamine the system's goals and policies.[1] This reexamination should have resulted in an increased awareness of and focus on the emotional and financial harm suffered by victims of juvenile crime. Unfortunately, the contrary is true. Discussion and debate concerning the "physical, emotional and financial stresses"[2] unique to victims of juvenile crime are virtually nonexistent.[3] This is particularly puzzling since statistics, which "barely hint at the human misery caused by serious juvenile crime" reveal that the nation's crime problem is a juvenile problem.[4]

In contrast to the juvenile justice system, the criminal justice system has recognized that victims of crime are frequently victimized not only by the perpetrator of the violent act, but also by a criminal justice system unresponsive to the needs of victims.[5] Although the criminal justice system's interest in victims as "consumers of justice"[6] is recent, and perhaps temporary, there has been, nevertheless, a concentrated effort by the system to relieve the victim from his financial and emotional burden. Professionals within the criminal justice system have generally advocated a two-fold approach to this problem: first, to protect the victim against future harm by improving the efficacy of the system and, second, to make the victim as financially whole as possible.[7] Since "victims of criminal acts suffer the same injury regardless of the age of the perpetrators,"[8] these recommendations address issues of public policy and legislation common to victims of juvenile crime as well.

The first recommendation, to improve the efficacy of the system, has a long

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political and social history in the United States.[9] Although admirable in intent, it represents wishful thinking and no more. Despite the best creative efforts of juvenile justice professionals and millions of tax dollars spent by federal and state governments,[10] the rate of juvenile crime continues to rise.[11] There is, therefore, no reason to expect that future innovations and expenditures will lessen the number of crimes committed by juveniles in this country.

The second recommendation encourages legislation aimed at making victims financially whole. Funded from the public coffers, these "crime victims compensation statutes" theoretically provide a "balm for the suffering of innocent victims of crime."[12] Numerous states have enacted these statutes and Congress has proposed similar legislation.[13] Yet, augmenting the role of the criminal or juvenile justice system to include additional responsibility for victims is doomed by a myriad of problems "ranging from funding and financial considerations to eligibility requirements."[14] Furthermore, similar to many governmental programs:

> *[V]ictim compensation is designed with the best of intentions, and appears to cost relatively little to achieve a desirable goal. In reality, victim compensation threatens to emerge as another tentacle of leviathan, encompassing far more territory and dollars then ever envisioned. Numerous similar stories have unfolded in recent years, and victim compensation would seem likely to offer an additional instance of bureaucratic growth.*[15]

Thus, the inevitable result is the creation of a new bureaucracy which will further overburden the already disgruntled taxpayer while failing to reduce crime or provide, in many cases, financial restitution.

In contemporary America, victims of juvenile crime and delinquency are in a position identical to that of victims of adult crime. The purpose of both the criminal justice and juvenile justice systems is the deterrence, rehabilitation, and punishment of criminals.[16] Redress for the victim is not a feature in either system. The victim who wants to recover his losses and simultaneously exact a measure of vindication has but one solution: he must hire a lawyer and sue in a civil court.[17]

There are, of course, limitations on the use of a civil remedy by victims. In many cases the adult criminal or tortfeasor will be judgment-proof, thus, the victim will not bother to litigate. Since it is especially true that even fewer juveniles are capable of satisfying a judgment against them, the barrier to recovery is more insurmountable for the victim of a juvenile crime. In effect, the victim of juvenile crime has no remedy.

Since the 1950's, state legislatures have attempted to overcome this obstacle to recovery by providing victims of juvenile crimes with a statutory means of financial redress. These civil statutes, generally entitled "parental responsibility acts" or "parental liability acts"[18] were enacted to serve two goals: (1) to compensate victims of juvenile crimes by imposing vicarious liability on parents of children who intentionally or maliciously harm the person or

property of another, and (2) to deter juvenile crime and delinquency by encouraging increased parental supervision.[19]

For thirty years, this legislative device has had the potential to serve the financial as well as emotional needs of many victims of juvenile delinquency. The use of vague and ambiguous terminology in the acts, however, has vitiated their effectiveness.[20] The Model Parental Liability Act, proposed in Part IV of this Article and discussed in the Commentary section of Part V, seeks to eliminate many of the impediments to recovery, thereby encouraging victims to seek the financial compensation and emotional vindication promised them in the statutes.

In order to understand the design and purpose of the Model Act, the historical development and judicial interpretation of the state acts must be examined. Part I, therefore, reviews the severity of the common law restrictions on financial recovery against a parent of a juvenile tortfeasor. Part II compares the common law with the civil law of Louisiana and Hawaii, both of which have long held parents liable for the torts of their children. Finally, Part III analyzes the cases which have determined the constitutionality of state parental liability acts.

I. The common law

At common law, parents are not liable for damage caused by their children unless the damage can be attributed to some action or inaction of the parents.[21] As a general rule, the parent is liable only if: (1) he directed the act, (2) he ratified the child's act by acceptance, (3) the child was acting as his agent or servant, (4) the child was entrusted with a dangerous instrumentality *per se*, such as a gun, or (5) the child was negligently entrusted with an automobile.[22] The social policy underlying the severe limitations on recovery against parents for the intentional torts of their children is based on the belief that parents should not be burdened with liability due to a child's incorrigibility or "nasty disposition."[23]

This common law rule developed during the time of the leading cases of *Brown v. Kendall*[24] and *Stanley v. Powell*.[25] Both held there could be "no liability without fault."[26] Thus, "causation liability" was superceded by "*culpa* liability," and the standard required by the common law is now one of reasonable conduct.[27] Proceeding on the theory of liability flowing from culpability, the primary attention of the modern law "was diverted from the fact and the extent of the sufferer's damage and became fixed upon the wrongfulness of the actor's conduct."[28]

In practice, therefore, and to the detriment of the victim, a parent is liable only if the parent had *notice* of a specific type of harmful conduct on the part of the child *and* an *opportunity* to interfere or warn others of the danger.[29] A thorough review of the case law yields few instances where an innocent victim was able to overcome this two-pronged standard and recover compensation.[30] It

is beneficial to compare the severity of the common law with the civil law approach which recognizes and better serves the needs of the victim.

II. The civil law

The civil law rule of parental liability presents a significant contrast to that of the common law. The civil codes of France, Quebec, Louisiana, and Hawaii have provided for parental liability whereas common law jurisdictions have not.

Initially, it would be prudent to briefly examine the historical roots which may account for the development of these differences. One authority suggests that:

> *[H]ere in its unmodified form, we find an interesting and important difference between the common law and the civil law. The accent of the former upon the notion of individual responsibility might be said to illustrate the general emphasis of the English common law upon the individual as seen through Renaissance and English Reformation thought. The civil law's preoccupation with the notion of family solidarity, received from the Roman law, is a theme which runs throughout the codes.*[31]

Fundamentally, and of immediate importance here, the distinction may be summed up as the difference between the common law doctrine of "no liability with fault" and the civil law concept that "where one of two innocent persons must suffer a loss it shall fall on him who acted."[32]

Hawaii and Louisiana both enacted parental responsibility acts long before the adoption of these laws by the common law states. Hawaii adopted the civil code rule in 1884,[33] yet the Hawaii Supreme Court has never directly interpreted the statute.[34] Prior to 1916, the statute was examined in three cases. First, the federal district court held that the statute did not impose liability when the child, because of young age, was not responsible for his acts.[35] A second court held that the father is liable in every case where the infant would be liable at common law.[36] Finally, the court held that the statute could not impose liability for breach of contract.[37]

Louisiana, unlike Hawaii, has an extensive history of litigation in this field. Article 2318 of the Louisiana Civil Code,[38] enacted in 1804 and modeled after the French statute, required parental negligence for liability. The parent was thus able to raise, as an affirmative defense, his inability to prevent the child from causing the damage. In that same year, and for reasons that remain a historical mystery, the Louisiana code was amended to repeal that provision.[39]

Early Louisiana cases held the parent to be liable whether the parent "could or could not have prevented the damage and regardless of whether the child himself could be held liable to the injured party."[40] However, in 1934 the Louisiana Supreme Court revised its interpretation of the statute and found that a parent could not be held liable if the child was legally incapable of fault.[41] Thus, only if the child was at fault and could be held liable to the injured party

did liability automatically attach to the parent.[42] Absent fault and liability of the child, the parent must be personally negligent to incur liability.

In a line of cases ending in 1975,[43] the Louisiana Supreme Court overturned their earlier decision and its progeny and reinstated the rule that a parent is liable regardless of his ability to prevent the acts of the child. Moreover, the child's lack of capacity to be at fault no longer constituted a defense against liability.[44] Therefore, under Article 2318 the only available defenses are a "showing of fault by a victim, fault by a third person, or a fortuitous event."[45] The rule finally expressed by the Louisiana Supreme Court is consonant with the intent of the Louisiana statute and the policy underlying the civil law that the victim should not bear the loss between two "innocent" parties.

Fifty years ago, the Louisiana cases and the civil law in general were criticized for presuming that "liability is a natural corollary of the relation of parent and child and that its imposition might have a socially healthful result."[46] It was further argued that:

> *[I]t has been the general experience that a standard of reasonable conduct can adequately deal with the ordinary situation of our economic and social life. As applied today the common law rule would seem satisfactorily to protect the third person from loss resulting from the acts of irresponsible minors.*[47]

Today, in hindsight, these thoughts appear both optimistic and incorrect. The rate of mayhem and destruction has not been checked under the common law nor have the victims been "adequately" redressed.

Moreover, the purpose of the civil law and parental responsibility acts is not confined to modification of the juvenile's behavior, although this is a legitimate legislative purpose. In fact, an honest appraisal would lead to the conclusion that these statutes will have an insignificant effect on delinquent behavior. Rather, the most important social and legal goal of these laws is to compensate the victim of juvenile offenses. In this respect, the civil law and parental liability acts serve the needs of the public and the victim.

III. Constitutionality

Since 1961, few reported cases have examined the constitutionality of state parental liability acts. The paucity of decisions by higher state courts may reflect the fact that trial courts have had little trouble disposing of constitutional challenges to the acts. It may also indicate that many victims of juvenile crime and their attorneys are simply unaware of the existence of these statutes. Regardless of the reason for the scarcity of reported decisions, judicial analysis of the constitutional issues in those decisions available, with few exceptions, have rarely been sophisticated or clear.

Generally, the constitutionality of these statutes are challenged under the fourteenth amendment: first, that the statutes deprive parents of property without due process of law by imposing liability without fault,[48] and, second,

that the statutes deny equal protection under the law. Excepting one Georgia case,[49] all reported decisions have upheld the constitutionality of these acts. The courts have concluded that the legislative purpose of the parental responsibility acts reflects either one or both of the two goals: the compensation of the victim, or the deterrence of juvenile crime. These purposes are a legitimate exercise of the state police power.

Prior to 1970, the constitutionality of parental liability acts was challenged only three times.[50] A Texas appeals court, in 1961, upheld the constitutionality of the Texas statute. The court, however, did not engage in a clear, well-reasoned analysis of the constitutional issues. The court found the statute "reasonable" and seemed to equate reasonableness with constitutionality.[51] The court also appeared favorably impressed with the fact that other states had similar statutes, and that law review commentators viewed these statutes as serving a positive purpose.[52] In addition, the court focused on the compensatory aspects of the statute rather than its possible deterrent effects on juvenile delinquency, and concluded that parents, not the innocent victims, should bear the loss.[53]

Two years later, the North Carolina Supreme Court reviewed a challenge to the constitutionality of the North Carolina act.[54] In contrast to the Texas court, the North Carolina Supreme Court emphasized the punitive nature of the statute which limited parental liability to five hundred dollars.[55] Because this amount would be inadequate to compensate many victims, the court reasoned that the statute "fails to serve any of the general compensatory objectives of tort law."[56]

Nevertheless, the North Carolina court held that the statute did not violate provisions of the state constitution nor the fifth amendment of the United States Constitution. According to the court, the state can legitimately enact punitive statutes aimed at curtailing juvenile crime as an exercise of its police power.[57] The court also noted that the child's parents were given the opportunity for a full hearing and adjudication.[58] The decision was unclear regarding the applicability of the fifth amendment, or whether the statute complied with procedural safeguards required by the fourteenth amendment.[59] Moreover, the court did not address the question of whether a statute with a high or unlimited amount of recovery would also be punitive and, hence, withstand a due process challenge.[60]

The Wyoming Supreme Court relied on these two cases to uphold the constitutionality of the Wyoming statute.[61] The court summarily stated that "courts will not declare a statute unconstitutional unless the unconstitutionality is clear."[62] In this case, defendants also raised an equal protection argument. They challenged the statute's imposition of liability upon the "natural parents" only, claiming that the differential treatment between natural parents and other custodians violated the equal protection clause of the fourteenth amendment.[63] The court rejected this argument on the ground that restricting liability to a

natural parent was reasonable and that all those within the class were treated equally.[64]

In 1971, the parental responsibility act of Georgia[65] was held unconstitutional in *Corley v. Lewliss.*[66] In *Corley*, the minor child, Bruce Brady, age 12, was involved in a fight which resulted in head injuries to the minor plaintiff, Clark Lewliss. Bruce Brady threw a brick or stone which struck the plaintiff in the forehead. The plaintiff brought suit against the minor's mother and uncle, with whom the defendant lived.

The Georgia Supreme Court held the statute violated the due process clause of the fourteenth amendment.[67] The Georgia court distinguished cases upholding parental liability statutes on the ground that the Georgia statute permitted unlimited recovery, while the other state statutes imposed limitations on the amount recoverable.[68] The court reasoned that the limitations on recovery imposed in the Texas, North Carolina, and Wyoming acts indicated that the acts were penal in purpose rather than compensatory.[69] It should be noted, however, that the Texas court had focused solely on the compensatory, not the deterrent effect on the Texas statute.[70]

The Georgia court concluded that since the statute permitted unlimited recovery, the act was not penal, but compensatory.[71] The court declared that the imposition of vicarious liability, based solely on the parent-child relationship, "would deprive the defendant of property without due process of law, would authorize recovery without liability, and would compel payment without fault."[72] As such, the statute violated the due process clauses of the state and federal Constitutions.

The Georgia court held that the statute violated due process under the state constitution as well as the fourteenth amendment of the federal Constitution. The court's interpretation of due process, however, was in direct conflict with the United States Supreme Court's treatment of substantive due process since 1934.[73] The Supreme Court continues to apply substantive due process analysis, but only where the government seeks to affect civil liberties, or where the Court determines that a right is "fundamental."[74] Rights which the Court has recognized as fundamental include:

> *most of the guarantees of the Bill of Rights, the right to fairness in the criminal process, the right to privacy, including some freedoms of choice in matters of marriage, sexual relations and child bearing, the right to travel, the right to vote, the freedom of association and some aspects of fairness in the adjudication of individual claims against the government procedural due process rights*[75]

The Georgia court did not point to any fundamental right violated by the statute. It merely concluded that the liability attributed to the act of the child deprives a parent of property without fault, and thus violates due process.[76]

If the court considered property to be a fundamental right, it failed to state a rationale supporting this conclusion. Moreover, the ownership of property *per*

se is not a fundamental right. It is, instead a procedural due process matter.[77] Since the statute did not deny the defendants any of the elements of a full adjudication, the integrity of procedural due process was maintained.

In the absence of a fundamental right, due process requires only that a law shall not be unreasonable, arbitrary or capricious, and that the means selected shall bear a rational relationship to the legislative objective sought.[78] The Georgia court did not examine the statute to determine if the application of vicarious liability to compensate a victim was an irrational exercise of the state's police power. Furthermore, the court did not consider the point at which the statutorily imposed limitation on recovery crosses the arbitrary line separating penal from compensatory acts. How much recovery, then, is too much recovery?

In no other state have the courts declared their respective parental liability acts unconstitutional. In *Hayward v. Ramick*,[79] the Georgia Supreme Court noted, eleven years after finding the parental liability act unconstitutional, that "*Corley* stands alone among a number of opinions dealing with the constitutionality of parental responsibility statutes. . . ."[80] The court then distinguished its earlier decision and upheld a revised Georgia statute,[81] finding the five hundred dollar ceiling on liability manifested the punitive purpose of the statute.[82] The court found that the state has a legitimate interest in controlling juvenile crime, and that "there is a rational relationship between the means used of (imposing liability upon parents of children who willfully or maliciously damage property) and this object."[83] Moreover, it is noteworthy that the Georgia Supreme Court may have been dissatisfied with its earlier decision. The court stated, "while *we do not reaffirm Corley*, we do hold that the legislature has met the objections to *Corley* in the new statute with which we now deal."[84]

Other courts have engaged in more traditional and thorough due process analyses following the finding of unconstitutionality by the Georgia court. These courts have consistently maintained that either or both, the deterrence of juvenile crime, and the compensation of the victim, are legitimate legislative ends, and parental responsibility acts are a valid means of achieving these goals.

The Maryland Court of Appeals, after reviewing the cases previously discussed, held that the Maryland statute reflected the state's legitimate interest in legislating a matter of general welfare and was, therefore, constitutional.[85] The court reasoned that:

> *The due process clause does not, anymore than the contract clause, inhibit a state from insisting that all contract and property rights are held subject to the fair exercise of the police power. . . . The exercise of the power is fair when the purpose is a proper public one and the means employed bear a real and substantial relation to the end sought and are not arbitrary or oppressive.*[86]

The Connecticut Court of Common Pleas upheld the constitutionality of the Connecticut parental responsibility act in 1977,[87] and acknowledged that the

statute had a dual purpose of curtailing juvenile delinquency and compensating victims.[88] The defendants raised two equal protection claims. They contended that the statute unconstitutionally differentiated between parents and all others who might be responsible for children. In response, the court held that the legislature could find a reasonable basis for such differentiation. Since parents are in the best position to exert the most control over their children, thus fulfilling the deterrence goal of the statute.[89] They also argued that the statute interfered with their fundamental right to raise and bear children. The court concluded that parents' liability for the torts of their children does not interfere with this right.[90] The court stated that with the "right to bear and raise children comes the responsibility to see that one's children are properly raised so that the rights of others are protected."[91] The court held that both purposes, deterrence and compensation, bear a rational relationship to the preservation and promotion of the public welfare.[92]

Similar issues were raised in an Ohio case, though the Ohio Court of Appeals more thoroughly addressed the due process claim.[93] As such, the court held compensation to property owners for damage caused by willful misconduct was a legitimate state goal and the imposition of a $2,000 judgment on the parents was reasonably related to that end.[94] The court noted, however, that the limitation on recovery may constitute a civil penalty since some victims will not be fully compensated, thereby frustrating the statute's compensatory purpose.[95] Nevertheless, the court held that although the statute contained a limitation on recovery, the monetary amount was reasonable, practical, and usually sufficient to compensate the victim.[96]

The defendants argued the Act could not, in fact, be shown to deter juvenile crime, and therefore was not rationally related to that goal. The court found it unnecessary to examine this argument since compensation was, by itself, a legitimate state end.[97] The court added that a low recovery limit could compel it to determine if the deterrence of juvenile delinquency was a worthwhile objective in itself - a conclusion which would force the court to analyze the statute's actual effect on juvenile delinquency.[98]

In 1979, the Illinois Court of Appeals held that the state's parental responsibility act was a constitutional exercise of the state's police power.[99] The defendants raised a number of claims in support of their constitutional challenge. They asserted that the law was unconstitutional, because it deprived a parent of property without due process of law by imposing liability on a parent who did not commit the tort.[100] The defendants also ingeniously argued that in other liability without fault statutes, such as workmens' compensation, the party held liable reaps a benefit from the activities of the person for whom he is held legally responsible. Thus, in those situations it seems justifiable to impose some of the costs of these activities on the party held liable.[101] The defendants claimed, therefore, that the vicarious liability aspect of the parental responsibility act is flawed because the person vicariously liable (the parent) is

not benefiting from the tortfeasor's activities (the child's offense).[102] The court did not directly respond to this argument but merely found that no violation of due process had occurred.[103]

Another argument was asserted that holding only parents liable creates an unreasonable classification, thus violating the equal protection clause of the fourteenth amendment.[104] The defendants argued that other societal groups have a strong influence on the conduct of children, thereby limiting the degree of parental control over their children.[105] The court responded simply that the unequal treatment in the statute had a "reasonable basis in fact."[106]

In their second equal protection argument, defendants claimed that the statute is an invalid exercise of the state's police power.[107] The defendants contended that the statute is not rationally related to the punitive goals of the statute, since parental control over juvenile behavior is vague and limited.[108] The court did not explore this issue but summarily concluded that the statute is a legitimate exercise of the state's police power, and is, therefore, proper.[109] The defendants also questioned the scope and coverage of the statute, asserting that torts committed by a juvenile outside the boundaries of the statute's definition of a minor go uncompensated.[110] The court did not address this issue at all.

In a recent decision concerning a New Jersey statute,[111] the issues raised by the parties were somewhat different from those discussed in the previous cases. The New Jersey statute applied only to parents or guardians of minor children in public schools who damage public school property.[112] The New Jersey Supreme Court first considered the scope of the statute. It found that liability was not based solely on the parent-child relationship, but applied also to those who have custody and control of the child, and are responsible for the child's conduct.[113] Furthermore, although the statute contains no explicit reference to liability based on the *willful* or *malicious* conduct of minors, the court read these restrictions into the statute.[114] The court justified this finding by concluding that this was consonant with one of the legislative purposes - deterrence of vandalism.[115] Thus, the legislature "was concerned not solely with compensating school boards for damage to property but also with deterring delinquent behavior. Permitting the school board to recover from the parents where a child has caused damage negligently or without fault would not further the purpose of deterrence in any way."[116]

The court then dealt with the constitutional issues raised by defendants. First, defendants claimed that the statute violated due process, asserting that no rational relationship exists between the purpose of deterring delinquent behavior and the imposition of liability on parents.[117] In response, the court discussed vicarious liability and its application in other contexts and the rationale behind it. The court noted that, "in most instances, strict or vicarious liability has its sources in a public policy decision that the person liable is in a position to spread the cost of injury over a large portion of the public."[118] The court found that the legislature could reasonably believe that holding parents liable

for the willful and malicious acts of their children would induce parents to exercise more control, thereby deterring juvenile delinquency and minimizing the cost to the public.[119] The court also upheld the statute's unlimited recovery, stating that a maximum ceiling would be contrary to the compensatory purpose of the statute.[120]

Defendants also suggested that their fundamental right to bear children is burdened by the parental responsibility act. The court dismissed this claim stating, "the effect of the vicarious liability statute on the decisions of individuals to bear and beget children is speculative at best." and that "[o]ther laws impose financial burdens on parents" as well.[121] The court stated that the strict scrutiny standard was not triggered since no fundamental right or suspect classification was implicated.[122] Thus, in order to withstand an equal protection challenge, the statute need only rationally relate to a legitimate state purpose that does not constitute invidious discrimination.[123] Furthermore, the court held that the difference in treatment between parents of public school children and parents of other children was rationally related to a legitimate government objective.[124]

Florida and South Carolina courts have summarily upheld the constitutionality of their respective state parental liability acts. The Florida District Court of Appeals concluded that the rational basis of the statute is legitimately related to the deterrence of juvenile crime.[125] The court held that since "we feel the better view supports constitutionality, we reverse and remand upon the well-reasoned authority, which we adopt. . . ."[126]

The South Carolina Supreme Court noted that although "our statute has never been construed, North Carolina's similar statute was considered in *General Insurance Company of America v. Faulkner,* 259 N.C. 317, 130 S.E.2d 645 (1963) and found to be constitutionally within the state's police power."[127] The South Carolina court then restated the reasoning of *Faulkner,*[128] but did not expressly hold the South Carolina statute constitutional. Instead, the court proceeded to apply the act to the facts of the case.[129] Apparently, the court intended that the *Faulkner* rationale apply to the South Carolina act.

The constitutionality of New Mexico's parental liability statute was recently upheld.[130] Defendants primary claim was that the 1977 New Mexico act, as it existed in 1979 when plaintiff was injured, was unconstitutional because parents were liable regardless of whether or not they had custody and control of their child.[131] The court agreed that the statute did not require parental control for liability to attach to parents, but that this only raises a question of the statute's "wisdom." The court properly observed that the "widom of the statute, however, is not our concern; doubt as to the statute's wisdom is not pertinent in determining whether the statute is unconstitutional."[132]

Defendants contended that the statute deprived them of equal protection since liability is imposed "solely because of their status relationship to their

daughter."[133] The New Mexico court rejected this argument on the ground that defendants failed to prove either that the statute is applied unequally among all parents of children who commit willful or malicious damage, or that such parents are an improper class.[134]

The court also rejected defendants general claim that the statute violated procedural due process by depriving them of property without due process of law.[135] Since the defendants failed to suggest that procedural due process was denied, the court recharacterized defendant's claim as a substantive due process issue. The court concluded that there "is no violation of substantive due process (by making the parents liable for the malicious or willful tort of Monika) if the statute imposing liability was within the scope of legislative authority (the police power), and if the statutory liability accords with the purpose of the statute."[136]

Defendants relied on a Georgia court decision to show that the New Mexico statute violated due process. The court distinguished the Georgia decision on the ground that the Georgia statute provided full compensation while "our statute limits damage compensation to a maximum of $2,500.00."[137] Adopting the reasoning of previous decisions upholding parental liability statutes,[138] the court held that the New Mexico statute did not violate substantive due process, since the legislature could properly determine that a "parental liability statute was reasonably necessary."[139]

The Federal District Court of Hawaii upheld the constitutionality of the Hawaii parental responsibility statute in 1982.[140] As discussed earlier in Part II, Hawaii was one of two American states that adopted the civil law rather than the common law approach to vicarious liability.[141] The Hawaii statute differs from the laws in other states in two respects: (1) there is imposition of unlimited liability with regard to tortious acts, and (2) there is parental liability for negligent, as well as intentional torts of children.

The primary issue raised by defendants was that the statute interferes with a parent's fundamental right to raise a family. They argued that the statute discourages persons from having children and interferes with the raising of children by placing a severe economic burden on the parents.[142] The court engaged in a well reasoned analysis of fundamental rights. It rejected defendants' attempt to bring the Hawaii statute within the purview of the United States Supreme Court decisions which hold that some personal choices affecting the family are important enough to be deemed "fundamental."[143] The court declared that, unlike the other interests held to be fundamental, the parental responsibility act is not one that implicates personal choice.[144] The court concluded that the presence of a threat of potential tort liability places no real burden on the decision to have a child.[145] The court stated, in fact, that a statute may interfere with the parents' interest in raising a family free from state imposed economic limitations.[146] "Although some families may undergo financial strain as a result of the statute, this fact alone does not establish

encroachment on a fundamental interest."[147]

Since no fundamental right was involved, the court found that the statute need only be rationally related to a legitimate government interest.[148] The statute not only provides compensation for tort victims[149] but may also deter juvenile delinquency by encouraging parents to more carefully supervise their children.[150] Defendants argued that the statute is not tailored to meet the latter objective since the statute imposes liability even where parents have exercised care in supervising their children.[151] The court dismissed this argument, concerning liability for a child's negligent acts, by finding that a statute need not be perfect in order to have a rational basis.[152]

The court held the statute does not contain an unconstitutional irrebutable presumption that natural parents are responsible for the torts of their children regardless of due care or custody.[153] The court concluded that this was basically an equal protection argument since classification is the problematic issue.[154] The court did state, however, that parents are not automatically liable for all damages caused by their children, and at trial, may use all the defenses available to their children.[155]

The defendants alleged that the statute discriminates against natural parents by failing to impose liability on others who may be equally responsible.[156] The court found that natural parents are not a suspect class, therefore singling out of natural parents for liability need only have a rational basis. The court held that the statute indeed has a rational basis but indicated that the statute may be interpreted to require "a nexus between natural parentage and a significant period of custody or control of the child."[157]

Although the courts have uniformly upheld the constitutionality of state parental liability acts, the statutes have provided little guidance for determining the scope and purpose of this legislation. The Model Parental Liability Act which follows is proposed to provide legislatures with a clear and simple means of achieving an important social goal: the financial compensation and personal vindication of victims of juvenile crime and delinquency. The Commentary following the Model Act briefly outlines the effect and intent of the operative terms and phrases used in the proposed statute. The Commentary is not intended to be all inclusive, but merely to provide a framework for understanding both the Model Act, and the flaws which undermine the effectiveness of current state acts.

IV. Proposed model parental liability act

Section 1. Title.

This Act shall be known as The Parental Liability Act.

Section 2. Definitions.

As used in this Act:

(a) "Parent" means any person who has legal custody and control of an unemancipated minor or places himself in the position of discharging parental rights, responsibilities, and liabilities.

(b) "Unemancipated minor" means any individual who is not the age of majority and is under the custody and control of a parent.

(c) "Person" means any natural person, partnership, association, private and public corporation, religious organization, the United States and any governmental agency, and the State and any state agency or political subdivision.

Section 3. Liability.

A parent and unemancipated minor shall be jointly and severally liable for all actual damages to any person or property resulting from the intentional commission of a tortious act by the minor.

Section 4. Costs and Attorney's Fees.

The court may award costs and reasonable attorney's fees to the prevailing party.

V. Commentary

A. Section 2. Definitions

1. *Section 2(a) - Parent.* The Model Act's definition of "parent" in Section 2(a) incorporates Section 2(c) of the Model Act which defines the term "person." The definition of "parent," therefore, includes any individual or entity who acquires the status of *in loco parentis.*[158] This is a departure from state parental liability acts which, with one exception,[159] fail to define the parties liable under the act. The state acts simply use the word "parent," either alone or in conjunction with the words "guardian" or *"in loco parentis."* Since the word "parent" at common law is strictly construed, those state statutes which impose liability upon the "parent" only, effectively limit liability to the "natural father or mother."[160] Although statutes limiting liability to natural parents are constitutional,[161] it is unreasonable for natural parents to shoulder liability while other "persons" with identical parental rights and responsibilities are not held liable.

Under the Model Act, state and federal governments as well as private and public agencies are potentially liable parties. The development of modern tort law has seen the erosion or abrogation of the common law rule of sovereign immunity.[162] Many states and the federal government have adopted this modern view.[163]

If the state has custody and control of an unemancipated minor and that minor commits a tort, the state should incur the same liability now placed on

other "parents." The purpose of the Model Act, and many acts, is to relieve the victim of financial hardship caused by the intentional harmful conduct of a minor. The Model Act equitably applies this policy to all parties. Moreover, as a practical consideration, the government and public or private agencies are generally insured. Since the purpose of insurance is to compensate the injured party by spreading the cost among the public,[164] there exists no overriding financial burden or public policy for denying recovery to the victim.[165]

The Model Act treats all persons legally responsible for minors equally. This expanded definition of "parent" must be considered in the context of the growing number of children who, due to divorce or changes in lifestyle, no longer live with one or both of their natural parents.[166] The victim's right to financial recovery against a "parent" under the Model Act, therefore, is predicated *solely* on a factual and legal determination of whether the "parent" had "custody and control" of the unemancipated minor at the time of the tortious conduct.[167]

2. *Section 2(b) – Unemancipated Minor.* The Model Act defines the term "unemancipated minor" to expressly include children under the age of majority. This is consistent with the rule that when a "minor attains the age of majority, emancipation occurs automatically by operation of law."[168] Absent specific reference to age or state law, however, a parental liability act may extend liability to parents of adult children. For example, several state acts simply use the word "child" in the statute.[169] Although courts may incorporate into the act the condition that the child be a "minor" at the time of the tort,[170] statutory vagueness could result in liability to parents beyond legislative intent.

As discussed previously in Section 2(a), parental liability under The Model Act is predicated upon a determination that the parents had "custody and control" of the minor.[171] Avoidance of parental liability will therefore depend on the parent's ability to prove as an affirmative defense that the minor was, as a matter of fact or by operation of law, emancipated.[172] Such a determination has historically required judicial resolution of complex, and often confused, issues of law and fact.[173] Commentators have criticized this case-by-case method of determining emancipation as outmoded "in light of modern, cultural, social, economic, and legal conditions,"[174] and encouraged the enactment of comprehensive emancipation statutes similar to those adopted in California[175] and Connecticut.[176]

The Model Act, as a matter of statutory construction, should be consistent with applicable state laws. Thus, current problems in determining the legal and factual criteria for emancipation will inevitably arise under the Model Act. This is unavoidable unless the Act includes a lengthy definition of "emancipation." Since this is impractical and would conflict with the judicial and statutory law in many jurisdictions, legislatures should consider enacting modern emancipation statutes. Increased parental liability necessitates clear standards from which

parents can, with reasonable certainty, ascertain whether they are liable for the torts of their children and protect themselves by purchasing insurance or seeking dissolution of their rights and responsibilities.

3. *Section 2(c) - Person.* The term "person" is defined in a number of state parental responsibility acts. The purpose of these definitions is to list the parties who may bring an action against the parents of juvenile tortfeasors. The Model Act definition also serves this function. In addition, the Model Act's definition of "parent" clearly defines the parties who are liable under the Act.[177]

B. Section 3. Liability

1. *Joint and Several Liability.* In Section 3 of the Model Act, the terms "parent" and "unemancipated minor" are followed by the phrase "shall be jointly and severally liable."[178] The purpose of the Model Act is not served if the parent alone is held liable for the acts of the juvenile. The juvenile should be liable to the extent of his assets, if he possesses any. Thus, the Model Act encourages victims to treat the parent and child as joint tortfeasors for the purpose of satisfying a compensatory judgment.[179] Although the parent of the juvenile tortfeasor will often be responsible for paying the judgment, on those occasions where it is possible, the juvenile should contribute to the best of her ability.

2. *Actual Damages.* The Model Act permits recovery of actual damages in accordance with the compensatory purpose of the statute.[180] The Act, however, diverges from most of the states in that it has no ceiling on the amount which may be recovered from the parent of a child tortfeasor. Although limitation may bear a rational relationship to most injuries, many victims are left with the bulk of their medical and repair expenses.[181] Unlimited recovery will not place an onerous burden on parents of juvenile delinquents. The parent who is subject to a substantial judgment would be accorded all the statutory, judicial and procedural safeguards available to any debtor. Furthermore, and as several courts have recently pointed out, insurance is available to parents for the purpose of providing coverage from this type of liability.[182] In addition, current homeowner's insurance policies may protect parents under certain circumstances.[183] Statutory limitations on recovery operate exclusively to the detriment of the innocent victim particularly in the many cases where the parent is capable of satisfying the judgment.

3. *Person and Property.* The Model Act and more than half the states permit recovery for personal injury.[184] The remaining states limit liability to property damage. This limitation is untenable and frustrates the policies underlying this legislation. Juveniles are responsible for a large percentage of personal injury inflicted on victims each year.[185] Those states forbidding recovery for personal injury grant legislative immunity to those who intentionally harm others while undermining the legislative attempt to deter juvenile crime or provide aid to

victims. Since some of the most vicious and costly injuries to victims are physically inflicted by juveniles, the denial of this remedy by the legislature is the most egregious defect in current parental responsibility acts.[186]

4. *Intentional.* State parental liability acts generally require that the minor commit the tortious act "intentionally" or "willfully" for the victim to recover against the parent.[187] Although many state acts also require that the tort be committed both intentionally and with a "mischevious purpose, a design to injure or any ill-will,"[188] several courts have held that malicious conduct is equivalent to intentional conduct.[189] The Model Act adopts the term "intentional" in Section 3, because it imports the clearest standard of conduct, and is fair and consistent with the compensatory purpose of the Act. The requirement that the minor's act be "intentional" provides the parent with the opportunity to refute the victim's contention that the minor acted with the "purpose of causing such injury or with knowledge that the injury is substantially likely to follow."[190]

The term "intentional" in The Model Act is contained in the phrase "liable for all actual damages to any person or property *resulting* from the commission of a tortious act by the minor." Several courts have interpreted their state acts as limiting liability to the precipitory intentional act *only* and have forbidden recovery for injuries which resulted, or flowed, from the initial tort.[191] The language used in Section 3 of The Model Act specifically rejects this interpretation. Under The Model Act, the minor and his parents are liable for any harm "resulting" from the commission of the initial tort.[192] Section 3 of The Model Act, therefore, attaches liability to the parent if the victim can prove that the minor committed an intentional act, resulting in injury to the victim.

The Model Act does not hold parents liable for the *negligent* acts of their children.[193] Although consistent with the purpose of the Act, to compensate the victim, such a statute would probably not be socially or politically palatable at the present time. The increase in the availability of insurance may, however, eventually eliminate the need for this distinction.

C. Section 4. Costs and Attorney's Fees

In some cases, a victim's damages are too small to warrant litigation under ordinary circumstances. The Model Act encourages a victim to seek compensation by permitting the judge the discretion to award costs and attorney's fees if the victim prevails.[194] A judge may award these expenses to assure the plaintiff just compensation in cases involving small judgments. Moreover, the possibility that the plaintiff may recover these costs from the defendant might encourage reluctant defendants to settle out of court rather than risk the additional expense of litigation. Alternatively, litigation which is aimed at harrassing a defendant is discouraged since the judge may assess these same expenses against the plaintiff. The judge, of course, may also elect to allow both parties to bear their own costs.

Conclusion

Defendant parents have challenged parental liability acts largely on the grounds that these acts interfere with their fundamental right to bear and raise children, and violate due process and equal protection under the fourteenth amendment. The courts, with one exception, have rejected these arguments and upheld the constitutionality of the statutes. In only a few cases, however, have the courts engaged in an in-depth analysis of the issues raised.

Several cases have specifically held that parental liability acts do not interfere with a "fundamental right" to bear and raise children. The fact that a few parents may incur some financial cost is not a great enough economic burden to interfere with a parent's *choice* to have children.

Several courts, antipathetical to vicarious liability doctrines, have concluded that the acts' only legitimate purpose is deterrence of juvenile crime. It has not been conclusively shown, however, that these acts encourage greater parental supervision of children, thereby reducing the number of juvenile crimes. Thus, if the purpose of the statute is deterrence, the act may not be rationally related to that goal. The courts have sidestepped this problem by finding that the *possibility* that these statutes may effectuate the desired result satisfies the rationality requirement.

Other courts have held that compensation of victims is a legitimate state purpose in itself. If compensation is the legislative goal, however, imposition of too low a ceiling on recovery may not be rationally related that end. A victim's financial costs may often exceed the limited ceiling established by many state statutes. Nevertheless, the courts have consistently held that parental liability acts bear a rational relationship to either deterrence or compensation or both, and therefore reflect a legitimate legislative purpose.

For thirty years, state legislatures have acknowledged the need to protect and compensate victims of juvenile crime and delinquency. The courts have supported the legislatures' prerogative to provide victims with an effective and equitable means of financial redress. The Model Act is a positive step in that direction. Drafted in clear and simple language, it is hoped that the Model Act will encourage victims to use this civil remedy. Moreover, The Model Act's elimination of ceilings on recovery substantially enhances the decisive role state legislatures have traditionally assigned tort law in fostering "increased consciousness of social responsibility, of social engineering."[195] The Model Act is a potentially successful means of achieving these goals.

Endnotes

1. There is a vast disagreement among authorities as to precisely what "new" goals and policies, if any, should be implemented. *See generally*, Coates, *Deinstitutionalization and the Serious Juvenile Offender: Some Policy Considerations*, 27 Crime & Delinq. 477 (1981); Gardner, *Punishment and Juvenile Justice: A Conceptual*

Framework for Assessing Constitutional Rights of Youthful Offenders, 35 Vand. L. Rev. 791 (1982); Hayes & Johnson, *Confining Wayward Youth: Notes on the Correctional Management of Juvenile Delinquents*, 32 Juv. & Fam. Ct. J. 23 (November 1981); Kaufman, *The Child in Trouble: The Long and Difficult Road to Reforming the Crazy-Quilt Juvenile Justice System*, 60 Wash. L.Q. 743 (1982) [hereinafter cited as Kaufman, *The Child in Trouble*].

These "modern-day reformists" and their new ideas are scrutinized in McNally, *Nearly a Century Later: The Child Savers-Child Advocates and the Juvenile Justice System*, 33 Juv. & Fam. Ct. J. 47, 51 (1982).

2. Attorney General's Task Force on Violent Crime, Final Report, U.S. Department of Justice 22 (1981) [hereinafter cited as Task Force on Violent Crime].
3. The victim of juvenile crime is generally left with a worthless civil action against an insolvent minor. Furthermore, in forty-eight states the common law effectively precludes parental liability for the harmful acts of their children, except in very narrow circumstances. *See infra* notes 21-30 and accompanying text. In contrast, the civil law rules adopted by Hawaii and Louisiana permit victims to recover damages against a parent with few limitations. *See infra* notes 31-47 and accompanying text. *See generally*, Comment, *Parent and Child - Civil Responsibility of Parents for the Torts of Their Children - Statutory Imposition of Strict Liability*, 3 Vill. L. Rev. 529 (1958) [hereinafter cited as Comment, *Civil Responsibility of Parents*].

   The victim of juvenile crime is also faced with social and economic pressures which may prevent or discourage suit by one member of a community against a parent within the same community. This, coupled with the humiliation and anger felt by the victim of any crime, is an especially harsh burden placed on the victim of juvenile crime.
4. Kaufman, *Book Review*, 90 Harv. L. Rev. 1052, 1053 (1977). The "statistics on the trend of juvenile crime are frightening by themselves, but the real effects on society may be even more shocking then the numbers would lead us to believe." National Advisory Committee on Criminal Justice Standards and Goals, "Report of the Task Force on Juvenile Justice and Delinquency Prevention" 1 (1976).

   Since 1960, arrests of juveniles for violent crime have increased almost 250 percent, more than double the comparable statistic for adults. *See* Kaufman, *The Child in Trouble*, *supra* note 1, at 746. *See also* Comptroller General of the United States, U.S. Dept. of Justice, How Federal Efforts to Coordinate Programs to Mitigate Juvenile Delinquency Proved Ineffective 1 (1975); *cf.* U.S. Dept. of Justice, Analysis of National Crime Victimization Survey Data to Study Serious Delinquent Behavior, Juvenile Criminal Behavior in the United States. It's Trends and Patterns, Monograph One 71-72 (1981) (Although juvenile crime is substantial it has not increased in five years and is identifiably less severe then youthful offenders (18 to 20 years old) or adult offenders). *See generally*, "Task Force on Violent Crime," *supra* note 2, at 81; U.S. Dept. of Justice, *Sourcebook of Criminal Justice Standards* 334-40 (1980); Federal Bureau of Investigation, U.S. Dept. of Justice, *Uniform Crime Reports for the United States* 188, 194-95 (1978).

   The crime statistics indicate that perpetration of major crimes by juveniles peaks in mid-to-late adolescence. *See* "Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime" 35-43 (1978).
5. *See* "Task Force on Violent Crime," *supra* note 2, at 22. In the 19th century, the juvenile justice system became a separate and distinct entity from the adult criminal justice system. The development of this separate judicial system for juveniles was founded on the belief that children would be better served by "protection and treatment" than by "punishment." The juvenile justice process

today, therefore, still possesses the characteristics and atmosphere of a civil, non-adversarial proceeding, rather than that of a criminal adjudication. *See generally*, A. Platt, The Child Savers (2d ed. 1977); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 Stan. L. Rev. 1187 (1970); Note, *The Representation of Juveniles Before the Court: A Look Into the Past and the Future*, 31 Case W.L. Rev. 580 (1981).

6. Hagan, *Victims Before the Law: A Study of Victim Involvement in the Criminal Justice System*, 73 Crim. L. & Criminology 317 (1982).
7. *See* "Task Force on Violent Crime," *supra* note 2, at 87.
8. Feld, *Juvenile Court Legislature Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal,"* 65 Minn. L. Rev. 167, 169 (1980).
9. *See generally*, *supra* notes 1 and 5.
10. Total expenditures by the states in 1977 was estimated at $707,732,000 for public juvenile custody facilities and $384,327,000 for private juvenile custody facilities. *See* U.S. Dept. of Justice, Sourcebook of Criminal Justice Standards 129 (1980); Law Enforcement Assistance Administration, U.S. Dept. of Justice, Children in Custody: Advance Report on the Juvenile Detention and Correctional Facility Census of 1974 5-6 (1977). In 1975, federal expenditures on delinquency and related problems were estimated at between $92 million and $20 billion. *See* Law Enforcement Assistance Administration, U.S. Dept. of Justice, First Comprehensive Plan for Federal Juvenile Delinquency Programs 3 (1976).
11. *See supra* note 4.
12. Meiners, *Public Compensation of the Victim of Crime: How Much Would It Cost?* in Assessing the Criminal: Restitution, Retribution and the Legal Process 328 (1977) [hereinafter cited as Meiners, *Public Compensation of the Victim.]*
13. *See generally*, Jones, *The Costs of Compensation* in The Costs of Crime 121 (C. Grey, ed. 1979); Hoelzel, *A Survey of 27 Victim Compensation Programs*, 63 Judicature 485 (1980); U.S. Dept. of Justice, Compensating Victims of Violent Crime: Potential Costs and Coverage of a National Program (1977).
14. Task Force on Violent Crime, *supra* note 2, at 91.
15. Meiners, *Public Compensation of the Victim*, *supra* note 12, at 329.
16. *See* McDonald, "The Role of the Victim in America," in *Assessing the Criminal: Restitution, Retribution and the Legal Process*, 296 (1977).
17. *Id.* at 295-96. The author incisively and critically traces the treatment of victims by the American criminal justice system from "central to peripheral actor in the system, from a prime beneficiary to an also-ran." *Id.* at 306.
18. Citations to the state statutes are set forth in Appendix I, *infra*. Appendix I updates similar complications which appear in Note, *New Jersey Public School Parental Liability Act Held Constitutional: Board of Education v. Caffiero*, 34 Rut. L. Rev. 220, 224-26 (1981); Note, *The Iowa Parental Liability Act*, 55 Iowa L. Rev. 1037, 1037-38 (1970) [hereinafter cited as Note, *The Iowa Act].*
19. *See* Note, *The Iowa Act*, *supra* note 18, at 1037. In a philosophical examination of the dispute between deontological and utilitarian moral theories, Professor George P. Fletcher poses the purpose of tort law in these terms: "[D]o we require tort-feasors to compensate their victims because the victims deserve a monetary surrogate for their injuries or, alternatively, because we wish to stimulate changes in the behavior that generates accidents?" Fletcher, *Punishment and Compensation*, 14 Creighton L. Rev. 691, 692 (1981).
20. *See* Note, *The Iowa Act*, *supra* note 18, at 1038.
21. *Id.* at 1038-39.
22. *See* W. Prosser, Law of Torts § 123, at 871-73 (4th ed. 1971) [hereinafter cited as W. Prosser]. *See generally*, Comment, *Parental Liability for a Child's Tortious Acts*, 81 Dick. L. Rev. 755 (1977).

23. W. Prosser, *supra* note 22, at 873.
24. 60 Mass. (6 Cush.) 292 (1850).
25. 1 Q.B. 86 (1891).
26. Note, *Torts: Parents and Child: Liability of Parent for the Torts of Minor Child*, 19 Cornell L.Q. 643, 646 (1933-34) [hereinafter cited as Note, *Torts: Parent and Child*].
27. *Id.*
28. *Id.* The notions of "culpability" and "intent" derive from what Justice Holmes described as "blameworthiness," that is liability arising out of conduct which would be blameworthy in "the average man, the man of ordinary intelligence and reasonable prudence." O. Holmes, "The Common Law" 4 (1923). *See e.g.*, Goldman, *Restitution for Damages to Public School Property*, 11 J. Law & Educ. 147, 149 (1982).
29. *See* W. Prosser, *supra* note 22, at 873.
30. There are many tragic examples of the severity and unfairness the common law rule has on victims of juvenile crime and delinquency. Two recent, and especially egregious examples, occurred in *Parsons v. Smithey*, 504 P.2d 1272 (Ariz. 1973) (victim suffered lacerated ear, multi-contusions and fractures when attacked by 14-year-old with a lengthy history of violent conduct) and *Moore v. Crumpton*, 295 S.E.2d 436 (N.C. 1982) (victim raped at knifepoint by 17-year-old who had long history of mental illness and drug problems). In both cases, the children were released from detention facilities and returned home. The courts held that the parents could not have "anticipated" the conduct of their child.
31. Stone, *Liability for Damage Caused by Minors: A Comparative Study*, 5 Ala. L. Rev. 1, 6 (1952).
32. Note, *Torts: Parent and Child*, *supra* note 26, at 646. For a fascinating and scholarly discussion of the development and history of the common and civil laws throughout the world, *see* Takayanagi, *Liability Without Fault in the Civil and Common Law*, 16 Nw. U. L. Rev. 163, 268 (1921-22) & 17 Nw. U. L. Rev. 187, 416 (1923-24).
33. *See* Hawaii Rev. Stat. § 577-3 (1976). The Hawaii statute is unique because it permits victims to recover for all torts "regardless of whether based upon negligence or intentional acts." Letter from Steven J. Trecker, Esq., to lead authors (November 3, 1982) (Trecker was plaintiff's counsel in *Bryan v. Kitamura*, discussed *infra* notes 138-55 and accompanying text) [hereinafter cited as Letter from Steven J. Trecker].
34. Since Hawaii did not formally become a state until 1958, the three cases discussed *infra* notes 35-37 and accompanying text were decided by the United States District Court for the District of Hawaii.

The constitutionality of the Hawaii statute has been upheld on at least two occasions by the state trial courts. *See Bryan v. Kitamura*, 529 F.Supp. 394, 396 n. 5 (D. Hawaii 1982).
35. *Day v. Day*, 8 Hawaii 715 (1891).
36. *Victoria v. Palama*, 15 Hawaii 127 (1903).
37. *Rathburn v. Kaio*, 23 Hawaii 541 (1916).
38. The Louisiana Parental Responsibility Act holds the father *solely* liable while he is alive, unless custody of the minor has vested in the mother at his death or by operation of law. *See e.g.*, *Semien v. State Farm Mutual Aut. Ins. Co., Inc.*, 398 So.2d 161, 164 (La. Ct. App. 1981); *Guidry v. State Farm Mutual Auto. Ins. Co., Inc.*, 201 So.2d 534-36 (La. Ct. App. 1967), *appeal denied*, 203 So.2d 557 (La. 1967).
39. *See* Note, *Torts: Parent and Child*, *supra* note 26, at 644-45.

40. Comment, *Civil Responsibility of Parents*, *supra* note 3, at 532 (footnote omitted).
41. *Johnson v. Butterworth*, 180 La. 586, 157 So. 121 (1934).
42. *Id.*
43. *Turner v. Bucher*, 308 So.2d 270 (La. 1975). (Six-year-old boy struck pedestrian with his bicycle injuring her. Father strictly liable whether or not he could have prevented the act.)
44. *Id.* at 277.
45. *Ryle v. Potter*, 413 So.2d 649, 651 (La. Ct. App. 1982). (Ten-year-old boy shot another boy with air rifle and strict liability imposed on boy's parents.)
46. Note, *Torts: Parent and Child*, *supra* note 26, at 647. In contrast, one commentator, in an article favoring parental liability under the so-called "automobile doctine," argued that:

    > [W]e are perfectly aware that this is a period in which parents do very little forbidding. We are aware also that the pernicious philosophy of education now dominant, which apothesizes self-expression, is interpreted to permit the child to make an unrestrained fool of himself in as many ways as his immature impulses may dictate. But that philosophy does not excuse parents for letting the child make a nuisance of himself to others. . . . [W]e offer the suggestion that inasmuch as parents, in our legal system, have hitherto had all the right and none of the responsibilities that other legal systems attribute to them, it is not excessive nor unfair to burden them with this particular responsibility – harmonious as it is with the exceptional principle above described, viz., responsibility for children's harmful acts which could have been prevented by watchful exercise of the parental power.

    Wigmore, *Torts: Parent's Liability for Child's Torts*, 19 Nw. U. L. Rev. 202, 205 (1924-25).
47. Note, *Torts: Parents and Child*, *supra* note 26, at 647. The author also argued that the civil law rule "seems quite as likely to foster birth control." *Id.* Subsequent study of the population growth in the civil law states may verify this conclusion.
48. Dean Prosser defined vicarious liability, as follows:

    > *A* is negligent, *B* is not. "Imputed negligence" means that, by reason of some relation existing between *A* and *B*, the negligence of *A* is to be charged against *B*, although *B* has played no part in it, has done nothing whatever to aid or encourage it, or indeed has done all that he possibly can to prevent it. W. Prosser, *supra* note 22, at 458.
49. *Corley v. Lewliss*, 227 Ga. 745, 182 S.E.2d 766 (1971). *See infra* notes 65-78 and accompanying text. (Twelve-year-old boy riding a bike hit another boy in the forehead with a brick or stone).
50. *General Ins. Co. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963); *Kelly v. Williams*, 346 S.W.2d 434 (Tex. Civ. App. 1961); *Mahaney v. Hunter Enter., Inc.*, 426 P.2d 442 (Wyo. 1967).
51. *Kelly v. Williams*, 346 S.W.2d 434, 437 (Tex. Civ. App. 1961). (Fifteen-year-old boy stole car and drove it at 110 miles per hour during a police chase, damaging the car). The Texas Court of Civil Appeals recently refused to reverse *Kelly* and held that the Texas statute does not deny "equal protection under the law or due process of law." *Buie v. Longspaugh*, 598 S.W.2d 673, 676 (Tex. Civ. App. 1980). (Two minor girls vandalized three houses, court held $5,000 limit of recovery would be applied to each act.)
52. *Kelly*, 346 S.W.2d at 437.
53. *Id.* at 438.
54. *General Ins. Co. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963) (the statute is N.C. Gen. Stat. § 1-538.1 (1961)).

55. In 1981, the statutory limit to recovery was raised to $1,000. *See* Appendix, *infra*.
56. *General Ins. Co.*, 259 N.C. at 323, 130 S.E.2d at 650. (Eight-year-old boy set fire to the drapes in the school).
57. *Id.*
58. *Id.*
59. *See* Note, *The Iowa Act*, *supra* note 18, at 1042.
60. *Id.*
61. *Mahaney v. Hunter Enter., Inc.*, 426 P.2d 442 (Wyo. 1967). (Thirteen and sixteen-year-old boys broke a plate glass window in a store.) *See generally*, Note, *Parental Tort Liability*, 1 Land & Water L. Rev. 299 (1966).
62. *Mahaney*, 426 P.2d at 444.
63. *Id.*
64. *Id.*
65. Ga. Code Ann. § 105-13 (1968), *repealed* by Ga. Code Ann. § 51-52-53 (Supp. 1983).
66. 227 Ga. 745, 182 S.E.2d 766 (Ga. 1971).
67. *Id.*, at 751, 182 S.E.2d at 770.
68. The current version of the Georgia statute limits parental liability to $5,000.00. Ga. Code Ann. § 50-2-3 (Supp. 1983).
69. *Corley*, 227 Ga. at 749, 182 S.E.2d at 769.
70. *See supra* notes 51-53 and accompanying text.
71. *Corley*, 227 Ga. at 750, 182 S.E.2d at 770.
72. *Id.* at 750-51, 182 S.E.2d at 770, (quoting *Lloyd Adams, Inc. v. Liberty Mut. Ins. Co.*, 190 Ga. 633, 641, 10 S.E.2d 46, 51 (1940)). The court relied on three prior decisions: *Frankel v. Cone*, 214 Ga. 733, 107 S.E.2d 819 (1959); *Buchanan v. Heath*, 210 Ga. 410, 80 S.E.2d 393 1954; and *Lloyd Adams, Inc. v. Liberty Mut. Ins. Co.*, 190 Ga. 633, 10 S.E.2d 46 (1940) in holding that liability created solely by nature of the statute without any fault by the plaintiff was unconstitutional.
73. *See Nebbia v. New York*, 291 U.S. 502 (1934).
74. *See* J. Nowak, R. Rotunda, & J. Young, Constitutional Law 409 (1978) [hereinafter cited as Nowak, Constitutional Law]. *See generally*, L. Tribe, American Constitutional Law § 11-2 (1978).
75. *See* Nowak, Constitutional Law, *supra* note 74, at 409.
76. *Corley*, 227 Ga. at 750-51, 182 S.E.2d at 770.
77. *See* Nowak, Constitutional Law, *supra* note 74, at 490-91.
78. *See Nebbia*, 291 U.S. 502, 525 (1934).
79. 248 Ga. 841, 285 S.E.2d 697 (1982).
80. *Id.* at 843, 285 S.E.2d at 698.
81. 1976 Ga. Laws 511, § 2, *amended by* Ga. Code Ann. § 51-52-53 (1982), *amended by* Ga. Code Ann. § 51-52-53 (Supp. 1983). The 1976 version of the Act reduced the liability to a maximum of $500.00.
82. *Hayward*, 248 Ga. at 843, 285 S.E.2d at 699. Five years after *Corley*, the Georgia Assembly amended the Georgia code sections 105-13 to limit recovery to five hundred dollars. Following the court's decision in *Hayward*, the Georgia Assembly again amended the revised statute, sections 51-52-53, and raised the limitation on recovery to five thousand dollars. Ga. Code Ann. § 51-52-53 (Supp. 1983). It remains to be seen whether the court will hold that a $5,000 limitation manifests the punitive purpose of the statute. In the alternative, the court could overturn or narrow *Corley* by declaring that a compensatory purpose, with any ceiling on recovery, is a constitutional exercise of the state's police power.
83. *Hayward*, 248 Ga. at 843, 285 S.E.2d at 699.
84. *Id.* (emphasis added). In the eleven years between *Corley* and *Hayward*, the composition of the Georgia Supreme Court changed completely, such that not one

justice from *Corley* participated in the *Hayward* decision.

85. *In re Sorrell*, 20 Md. App. 179, 315 A.2d 110 (Ct. Spec. App. 1974). (Two brothers assaulted a man by striking him with their fists.)
86. *Id.* at 188, 315 A.2d at 115 (quoting *Allied Am. Co. v. Comm'r*, 219 Md. 607, 616 150 A.2d 421, 427 (1959) (citations omitted). The court also questioned the soundness of the Georgia court's reasoning by *Corley*. The court remarked, "even acceptance of the inference suggested in *Corley*, that limitation upon the *amount* of vicarious parental liability would affect the constitutionality of a legislative *right* to impose it, the appellants here are not aided." *Id.* at 187, 315 A.2d at 115 (emphasis added).
87. *Watson v. Gradznik*, 34 Conn. Supp. 7, 373 A.2d 191 (C.P. 1977). (Suit against parents of a minor for wrongful conversion of property).
88. *Id.* at 10, 373 A.2d at 193.
89. *Id.* at 8, 373 A.2d at 192.
90. *Id.*
91. *Id.*
92. *Id.* at 10-11, 373 A.2d at 193.
93. *Rudnay v. Corbett*, 7 Ohio Op.3d 416, 374 N.E.2d 171, (Ct. App. 1977). (Action against custodial person for willful damage of a car by two minors.)
94. *Id.* at 419, 374 N.E.2d at 175.
95. *Id.* at 419 n.5, 374 N.E.2d at 175 n.5.
96. *Id.* at 419, 374 N.E.2d at 175.
97. *Id.* at 420, 374 N.E.2d at 175.
98. *Id.*
99. *Vanthournout v. Burge*, 69 Ill.App.3d 193, 195, 387 N.E.2d 341, 343-44 (App. Ct. 1979). (Eleven-year-old boy drove a car off the road causing damage to the car). The *Vanthournout* decision is analyzed in Fish, *Constitutional Law/Parental Responsibility*, 68 Ill. Bar. J. 474 (March 1980).
100. *Vanthournout*, 68 Ill. App. at 194, 387 N.E.2d at 342.
101. *Id.* Other examples given of no-fault liability accompanied by a benefit on the part of the liable party are: the liability of an operator of a dram shop, the liability of a seller of food which may become adulterated, and the vicarious liability imposed under the "Family Purpose Doctrine." *Id.*
102. *Id.*
103. *Id.* at 196, 387 N.E.2d at 343-44. Defendant's argument was flawed in several respects. Vicarious liability has been justified on other grounds, including deliberate allocation of risk, distribution of cost through pricing, and liability insurance. *See generally*, W. Prosser, *supra* note 22, at 969.
104. *Vanthournout*, 68 Ill. App. at 195, 387 N.E.2d at 343.
105. *Id.*
106. *Id.* at 196, 387 N.E.2d at 343 (quoting *Anderson v. Wagner*, 61 Ill.App.3d 822, 378 N.E.2d 805, 809 (App. Ct. 1978)).
107. *Id.* at 195, 387 N.E.2d at 343.
108. *Id.*
109. *Id.* at 196, 387 N.E.2d at 343-44.
110. *Id.* at 343.
111. *Piscataway Bd. of Educ. v. Caffiero*, 86 N.J. 308, 431 A.2d 799 (1981), *appeal dismissed*, 102 S.Ct. 560 (1981). (Parents of three public school pupils held vicariously liable for damage to school.)
112. N.J. Stat. Ann. § 18A:37-3 (West Supp. 1981). The New Jersey Parental Liability Act is embodied in sections 2A:53A-15 of the New Jersey code and imposes liability upon parents for willful or malicious injury by a child to real or personal property. N.J. Stat. Ann. §§ 2A:53A-15 (West Supp. 1982-83). Both section

18A:37-3 and section 2A:53A-15 contain no limitation on recovery against the parent.

113. *Caffiero*, 86 N.J. at 316, 431 A.2d at 803.

114. *Id.* at 316-17, 431 A.2d at 803.

115. *Id.* at 317, 431 A.2d at 803.

116. *Id.*

117. *Id.* at 318, 431 A.2d at 804.

118. *Id.* at 319, 431 A.2d at 804.

119. *Id.* at 319-20, 431 A.2d at 804-05. The court suggested that the resolution of juvenile crime must begin with the belief that:

> [P]arents should take responsibility for their children's activities. This responsibility comes with one's status as a parent and reaches legal and moral dimensions in our society. The laws of this State, if not the higher principles, may properly provide incentives for parents to fulfill their role in the lives of their children.

Id. at 327, 431 A.2d at 807.

120. *Id.* at 321, 431 A.2d at 805.

121. *Id.* at 323, 431 A.2d at 806. Defendants also asserted that free education is a fundamental right and that the New Jersey act unduly interferes with that right. Relying on *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973), the New Jersey Supreme Court held that no such federal right to a free education exists. *Caffiero*, 86 N.J. at 323, 431 A.2d at 806.

The court noted that the New Jersey constitution does protect, as a fundamental right, the right to a free education. *Id.* The court concluded that the statute does not burden this fundamental right since the "remote potential for vicarious liability of parents does not pose a sufficient threat to this right of their children." *Id.* at 323, 431 A.2d at 806-07.

122. *Caffiero*, 86 N.J. at 324, 431 A.2d at 807.

123. *Id.*

124. *Id.* at 324-25, 431 A.2d at 807.

125. *Stang v. Waller*, 415 So.2d 123 (Fla. Dist. Ct. App. 1982). (Upheld constitutionality of vicarious liability of parents whose children willfully destroy or steal property).

126. *Id.* at 124-25, citing *Piscataway Bd. of Educ. v. Caffiero*, 86 N.J. 308, 431 A.2d 799 (1981); *Kelly v. Williams*, 346 S.W.2d 434 (Tex. Civ. App. 1961); *Hayward v. Remick*, 285 S.E.2d 697 (1982).

127. *Standard v. Shine*, 278 S.C. 337, 295 S.E.2d 786, 787 (1982). (Six-year-old boy set fire to an apartment. Parents held liable for children's torts-court can cite minor.)

128. *See supra* notes 54-60 and accompanying text.

129. *Standard*, 295 S.E.2d at 788.

130. *Alber v. Nolle*, 98 N.M. 100, 645 P.2d 456 (Ct. App. 1982).

131. *Id.* at 103, 645 P.2d at 459. In 1981, the New Mexico legislature restored the "custody and control" requirement to the statute. *Id. See* N.M. Stat. Ann. § 31-46 (1981).

132. *Alber*, at 104, 645 P.2d at 460.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 105, 645 P.2d at 461 (citation omitted).

137. *Id.*

138. *See supra* notes 51-64 and accompanying text.

139. *Alber*, at 106, 645 P.2d at 462 (citation omitted).

140. *Bryan v. Kitamura*, 529 F.Supp. 394 (D. Hawaii 1982). The opinion of Judge Pence is a thoughtful and well reasoned analysis of the constitutional issues underlying parental liability acts. The threshold issue before the court in *Bryan* concerned the precedental authority of *Piscataway*, discussed *supra* notes 109-22 and accompanying text, which the United States Supreme Court dismissed for want of a substantial federal question. Judge Pence concluded that this "disposition is the equivalent to an affirmance on the merits. . . . This court is therefore bound by the result in *Piscataway* to the extent that the two cases may involve the same legal issues." 529 F.Supp. at 397 (citations omitted).

Judge Pence, however, concurred with defendants claim that the Hawaii statute, and the facts, differed significantly from *Piscataway*, thus requiring "detailed consideration of its [Hawaii Rev. Stat. § 577-3] alleged constitutional defects." *Id.*

141. *See supra* notes 33-37 and accompanying text.

142. *Bryan*, 529 F. Supp. at 398.

143. *Id.* at 398-99.

144. *Id.* at 399.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 400. The court recognized that the imposition of vicarious liability is justified by a public policy which holds that the person liable is in a position to "spread the cost of the injury to the public at large through the purchase of liability insurance." *Id.* (footnote omitted). The court found that this policy applies to parents, who can purchase liability insurance and protect victims from bearing "the entire cost of the injury suffered." *Id.* Moreover, the court noted that this "conclusion is buttressed by the fact that almost all of the defendants in the present action are so insured." *Id.* at 400 n.23.

In fact, the defendants in *Bryan* eventually settled for a total of $712,000.00, which came from the "homeowners policies of the defendant parents." Letter from Steven J. Trecker, *supra* note 33.

150. *Bryan*, 529 F. Supp. at 400.

151. *Id.*

152. *Id.*

153. *Id.* at 401.

154. *Id.*

155. *Id.*

156. *Id.* at 402.

157. *Id.* (footnote omitted). *Compare Alber v. Nolle*, 98 N.M. 100, 645 P.2d 456 (Ct. App. 1982), discussed *supra* notes 128-30 and accompanying text, which held a New Mexico statute that did not require parental "custody and control" constitutional.

158. "In loco parentis" has been defined as a person or entity "standing in the place of, or instead of, a parent; one charged fictitiously with a parent's rights, duties and responsibilities." *Leverly v. United States*, 162 F.2d 79, 85 (10th Cir. 1947).

159. Pa. Stat. Ann. tit. 11, § 2001(2) (Purdon Supp. 1982) defines "parent" to include "natural or adoptive parent."

160. *See generally*, 67A C.J.S. *Parent* (1978).

161. *See supra* notes 63-64, 155-56 and accompanying text.

162. Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. Ill. L. F. 919, 920-24,

163. Sellers, *State Tort Liability for Negligent Fire Inspection*, 13 Colum. J. L. & Soc. Prob. 303, 310-22 (1977); Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955*, 1966 U. Ill. L.F. 795, 796-810.

164. W. Prosser, *supra* note 22, at § 83. *Bryan* provides an excellent example of the availability of insurance to protect against juvenile acts. *See supra* note 147.

165. Dean Prosser characterized the trend of the law as follows:

> There is "a strong and growing tendency, where there is blame on neither side, to ask, in view of the exigencies of social justice, who can best bear the loss and hence shift the loss by creating liability where there has been no fault" . . . . The problem is dealt with as one of allocating a more or less inevitable loss to be charged against a complex and dangerous civilization, and liability is imposed upon the party best able to shoulder it.

W. Prosser, *supra* note 22, § 75 at 494-95. *Cf.* Note, *Holding Governments Strictly Liable for the Release of Dangerous Parolees*, 55 N.Y.U.L. Rev. 907, 908 (1980) "Not only would victims be treated more equally under such a system of tort liability, but holding the government strictly liable would best reconcile the competing social policies on which the institution of parole is based." *See generally*, "Task Force on Violent Crime," *supra* note 2, at 90-91.

166. *See e.g.* Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 U.C.L.A. L. Rev. 1125 (1981); Glick, *Children of Divorced Parents in Demographic Perspective*, 35 J. Soc. Issues 170 (1975); Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A. L. Rev. 1181 (1981), Zaharoff, *Access to Children: Towards a Model Statute for Third Parties*, 15 Fam. L.Q. 165 (1981).

167. State courts have determined parental "custody and control" on the basis of many factors, including actual physical custody of the minor or by operation of state law. *See, e.g., Flannigan v. Valliant*, 400 So.2d 225 (La. Ct. App. 1981) (liability of father superceded by custody award to wife following divorce); *Moore v. Crumpton*, 306 N.C. 618, 295 S.E.2d 436 (1982) (parents separated, mother not liable since child under the exclusive physical care of father); *Poston v. U.S. Fidelity & Guarantee Co.*, 107 Wis.2d 215, 320 N.W.2d 9 (Ct. App. 1982) (liability did not attach to divorced father not granted custody of minor).

168. Cady, *Emancipation of Minors*, 12 Conn. L. Rev. 62, 67 (1979) [hereinafter cited as Cady].

169. *See* Appendix I, *infra.*

170. *See e.g. Alber v. Nolle*, 68 N.M. 100, 103, 645 P.2d 456, 459 (Ct. App. 1982).

171. *See supra* note 165 and accompanying text.

172. "Emancipation may not be presumed but must be expressly or impliedly proven. Therefore, the burden was on the defendants to allege and prove, as an affirmative matter, that Douglas was in fact emancipated." *Conrad v. Dickerson*, 31, Ill.App.3d 1011, 1012, 325 N.E.2d 67-68 (App. Ct. 1975).

173. *See generally*, Katz, Schroeder & Sidman, *Emancipating Our Children - Coming of Legal Age in America*, 7 Fam. L.Q. 211, 214-32 (1973). Among the most frequently considered factors are:

> whether the child is living at home, whether the child is paying room and board if living at home, whether the parents are exercising disciplinary control over the minor, whether the child is independently employed, whether the child has been given the right to retain wages and spend them without parental restraints, whether the child is responsible for debts incurred and the extent of the parents' contributions toward the payment of outstanding bills, whether the child owns a major commodity such as a car, and whether the parent has listed the child as a

dependent for tax purposes. Age, of course, is also a critical element. *Id.* at 218 (footnotes omitted). Only marriage and enlistment in the Army have been deemed sufficient in themselves to constitute emancipation. *Id.* at 217.

But see Albert v. Ellis, 7 Ohio Op.3d 115, 359 N.E.2d 1033 (C.P. 1077) in which the parents of a sixteen-year-old, married, self-supporting son were held liable under the Ohio Parental Responsibility Act. The court held that unless the "actual physical custody and control" of the minor was taken from the parents by the state, the legislature intended to impose liability on *all* parents of children under eighteen regardless of the factual relationship of parent and child. *Id.* at 118, 359 N.E.2d at 1036.

174. Cady, *supra* note 166, at 62.

175. Cal. Civ. Code §§ 60-68 (West Supp. 1982). *See generally*, Cady, *supra* note 166, at 74-78.

176. Conn. Gen. Stat. Ann. §§ 46b-150 (a-e) (West Supp. 1982). *See generally*, Cady, *supra* note 166, at 78-80.

177. *See supra* notes 156-65.

178. For a general discussion of the legal principles and problems underlying the liability of joint tortfeasors, *see* W. Prosser, *supra* note 22, at §§ 46-52.

179. *See e.g., In re Appeal No. 321*, 24 Md.App. 82, 84-85, 329 A.2d 113, 114 (Ct. Spec. App. 1974) (mother ordered to make restitution for her son's mischief in a grocery store); *Liberty Mutual Ins. Co. v. Davis*, 52 Ohio Misc. 26, 368 N.E.2d 336, 338 (Akron Mun. Ct., 1977). (Parents held jointly and severely liable where children are involved in a common effort of destruction.)

180. "Compensatory damages and actual damages mean the same thing; that is, that the damages shall be the result of the injury alleged and proved . . . ." *Birdsall v. Coolidge*, 93 U.S. 64 (1876). It is also well-settled that:

> [O]ne who sustains bodily injury may recover damages for past and future physical pain and serious mental suffering accompanying such injury or produced thereby. This includes fright and shock at the time of the injury, pain during treatment, fear of future incapacity, and, in some states, the humiliation produced by mutilation or disfigurement. . . .

C. McCormick, Damages 315 (1935). Thus, a "claim for bodily pain lets in mental suffering. Damages for mental suffering if reasonable, are recoverable as compensation to which the claimant is entitled as a matter of right." *Id.* at 315-16. *See Alber v. Nolle*, 98 N.M. 100, 107, 645 P.2d 456, 463 (Ct. App. 1982), where the court held: "Pain and suffering is an actual damage recoverable under the parental liability statute."

181. *See e.g., Parsons v. Smithey*, 109 Ariz. 49, 504 P.2d 1272 (1973). (Fourteen-year-old boy attacked mother and daughter with a knife, hammer, and belt buckle.)

182. *See Bryan v. Kitamura*, 529 F.Supp. 394, 400 & nn. 22-23 (D. Hawaii 1982); *Piscataway Bd. of Educ. v. Caffiero*, 86 N.J. 308, 321 n.8, 431 A.2d 799, 804-05 n.8 (1981).

183. *See supra* note 142. *In Liberty Mut. Ins. Co. v. Davis*, 52 Ohio Misc. 26, 368 N.E.2d 336, (Akron Mun. Ct., 1977), the court concluded that "while standard homeowners policies usually provide for an exclusion from such coverage for intentional acts, a judgment against a minor's parents is not based on the parent's intentional act and therefore is not "excluded." Id. at 29, 368 N.E.2d 339.

Another court adopted the following paradigm:

> Assuming *A, B & C* are each insured under the policy, and *A* and *B* are independently liable in suits against them arising out of *C's* act there is no provision of the contract which should be construed to deny them coverage

simply because *C's* coverage would be excluded if an action were brought against him.

Shelby Mut. Ins. Co. v. United States Fire Ins. Co. 12 Mich.App. 145, 150, 162 N.W.2d 676, 678 (Ct. App. 1968). (The insured's minor son stole an automobile and damaged it through reckless operation).

184. *See* Appendix I, *infra.*

185. *See generally supra* note 4.

186. *See, e.g., Moore v. Crumpton,* 306 N.C. 618, 295 S.E.2d 436 (N.C. 1982).

187. Since the statutes require "intent" by the minor to commit the tort, the courts have imputed the common law rule that "a minor's conduct should be judged by the standard of behavior to be expected of a child of like age, intelligence, and experience under the circumstances" into the terms of the statute. *See, e.g., Walker v. Kelly,* 6 Conn. Cir. Ct. 715, 314 A.2d 785 (Cir. Ct. 1973) (five-year-old); *Lutteman v. Martin,* 20 Conn. Supp. 371, 135 A.2d 600 (C.P. 1957) (nine-year-old); *Connors v. Pantano,* 165 Neb. 515, 86 N.E.2d 367 (1957) (four-year-old). *See generally* Restatement (Second) of Torts § 283A (1965). *But see Standard v. Shine,* 278 S.C. 337, 295 S.E.2d 786, 788 (1982) in which the court interpreted the South Carolina Act to mean "no presumptions shall be indulged; minors of any age can commit intentional and malicious torts."

188. *Crum v. Groce,* 192 Colo. 185, 187, 556 P.2d 1223, 1224 (1976).

189. *See Potomac Ins. Co. v. Torres,* 75 N.M. 129, 401 P.2d 308 (1965). *See also Sutherland v. Roth,* 407 So.2d 139 (Ala. Civ. App. 1981); *City of Medford v. Swarbrick,* 24 Conn. Supp. 320, 190 A.2d 493 (Super. Ct. 1973); *Town of Groton v. Medbery,* 6 Conn. Cir. Ct. 671, 301 A.2d 270 (Cir. Ct. 1972); *Ortega v. Montoya,* 97 N.M. 159, 637 P.2d 841 (1981).

190. *Crum v. Groce,* 192 Colo. 185, 187, 556 P.2d 1223, 1224 (1976).

191. *See e.g., Farm Bureau Mut. Insur. Co. of Arkansas v. Henley,* 275 Ark. 122, 628 S.W.2d 301 (1982); *Crum v. Groce,* 192 Colo. 185, 556 P.2d 1223 (1976); *Peterson v. Sloan,* 56 Ohio St.2d 255, 383 N.E.2d 886 (1978); *Motorists Mut. Insur. Co. v. Bill,* 56 Ohio St.2d 258, 383 N.E.2d 880 (1978).

192. *See e.g., Potomac Insur. Co. v. Torris,* 75 N.M. 129, 401 P.2d 308 (1965); *Schirmer v. Losacker,* 24 Ohio Op.3d 171, 434 N.E.2d 1388 (Ct. App. 1980); *Francis v. Farnham,* 58 Or. App. 469, 648 P.2d 1349 (Ct. App. 1982).

193. *See* Appendix I, *infra.*

194. *Cf. Albert v. Nolle,* 98 N.M. 100, 108, 645 P.2d 456, 464 (Ct. App. 1982). *See generally* C. McCormick, Damages § 65 (1935).

195. Bischoff, *The Dynamics of Tort Law: Court or Legislature,* 4 Vt. L. Rev. 35, 43 (1979).

The right to safe schools

Kimberly A. Sawyer

In June, 1982, fifty-six percent of California voters approved Proposition 8, known as "The Victims' Bill of Rights."[1] The purpose of Proposition 8, in the words of the initiative's coauthor, Paul Gann, is to "restore victims' rights and help bring violent crime under control."[2] The people of California perceived a need for an initiative designed to fight crime because for the past twenty years the public had seen the courts expand the rights of criminal defendants while the crime rate was escalating.[3] The rising crime rate was attributed to the courts,[4] and judges acquired the reputation of being soft on crime.[5] Proposition 8 was designed in part to eliminate legal rules that favored defendants so that police and prosecutors would be better able to secure convictions of criminals.[6] A concurrent purpose of Proposition 8 was to improve the rights of victims of crime.[7]

Proposition 8 amended the California Constitution to include a recognition of constitutional rights for victims of crime.[8] The initiative added to article I of the California Constitution sections 28(a) through (g).[9] This comment will focus on California Constitution, article I, section 28(c), (hereinafter referred to as the safe schools provision), which guarantees the right to safe schools.[10]

The safe schools provision states: "*Right to Safe Schools.* All students and staff of primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful."[11] Some school administrators believe the safe schools provision is merely a statement of policy and claim procedures to promote safety on school campuses are currently in effect.[12] This comment will prove that this "inalienable" right to safe schools is much more than a statement of policy. The right to safe schools is a viable, enforceable right. Through rules of constitutional construction, the right to safe schools may be interpreted to give students and staff members of

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public schools the right to school campuses free of crime and violence. This comment will demonstrate that the courts should enforce the safe schools provision by imposing on school districts an affirmative duty to make their schools safe. A court, by giving the safe schools provision a common sense interpretation, should find that the school districts have a duty to make their schools safe. Additionally, a court will impose the duty by relying on federal and California cases which subscribe to the principle that public entities may not withhold protection of constitutional rights if that withholding actually deprives people of a constitutional right. Lastly, in imposing an affirmative duty, a court will rely on the school desegregation cases which hold that school districts are obligated to alleviate segregation in the schools to protect minority students' constitutional rights. After establishing that the right to safe schools is fully enforceable by the courts, this comment will suggest two possible damages remedies, one based on tort law and one based on the Constitution. Before a discussion of the enforceability of the safe schools provision, the provision itself must be interpreted.

Interpreting the new provision

The safe schools provision states: "All students and staff of public, primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful."[13] The safe schools provision is a constitutional provision,[14] and the interpretation of a constitutional provision is guided by certain general rules of construction.[15] The first step in interpreting a constitutional provision is to examine the language on the face of the provision.[16] Each word, phrase and sentence must be given its plain meaning, and only if the meaning is doubtful or ambiguous may other sources be used for interpretation.[17] This section interprets the safe schools provision by applying the above analysis.

A. "Inalienable right"

The safe schools provision provides that students and staff of public schools, elementary through senior high school, have an "inalienable right" to safe campuses.[18] *Black's Law Dictionary* defines "inalienable" as incapable of being surrendered or transferred.[19] Accordingly, inalienable rights are not given by the government nor may they be taken away or impaired by the government.[20] Inalienable rights are those important and basic rights which stem from the fundamental principles of the American system of government.[21] In California these highly regarded rights are embodied in article I of the California Constitution, the Declaration of Rights.[22] Inalienable rights, however, exist independent of the Constitution and are inherent in every person.[23] The inalienable right to safe schools, then, is inherent in each student and staff member of a public school and is so fundamental to each that the government may not terminate the right.[24] Therefore, because the right to safe,

secure and peaceful campuses is recognized as inalienable, the right should be seriously considered by courts, in interpreting the right, and by school officials, in applying the right, as a viable right rather than a mere policy statement.[25]

B. "Safe, Secure and Peaceful"

The meaning of each word, safe, secure and peaceful, is not particularly ambiguous. *Webster's Dictionary* defines safe as "secure from threat of danger, harm, or loss."[26] Danger, harm or loss, however, may come from many sources such as fire, earthquake, or crime, but the dictionary does not indicate any specific source.[27] This same problem arises when defining secure and peaceful. The definition of secure is "free from danger" or "free from risk of loss."[28] Peaceful is defined as "untroubled by conflict, agitation, or commotion."[29] Again, neither of the definitions indicates the source of the danger or the agitation.

Extrinsic aids must be referred to in determining what is a safe, secure and peaceful campus because of the ambiguities involved in the definitions of safe, secure and peaceful. The extrinsic aids available for interpreting the safe schools provision include a committee analysis of the safe schools provision, evidence of the intent of the voters who approved Proposition 8, and the California Supreme Court's recent ruling on the constitutionality of Proposition 8.[30] Other extrinsic aids such as official reports of the California Constitution Revision Commission and records of debates are not available because Proposition 8 was not proposed by the legislature, but was passed under the initiative process by the people of California.[31]

The first extrinsic aid is an analysis of the safe schools provision by the Assembly Committee on Criminal Justice.[32] The report discussed the possibility of deploying municipal police to school campuses to enforce the safe schools provision.[33] Common sense dictates that police would not be necessary to protect students and staff from ordinary accidents; more likely the police will be deployed on school campuses to protect students and staff from crime because repressing crime is a typical law enforcement function.[34] A logical conclusion is that a safe, secure and peaceful campus is one that is free from crime.[35]

An important extrinsic aid for interpretation is evidence of the intent and objective of the drafters of the safe schools provision and the people by whose vote the provision was adopted. This intent and objective may be ascertained from written arguments in voter pamphlets.[36] The written arguments in the June, 1982, voter pamphlet do not specifically address the safe schools provision;[37] however, the objectives of Proposition 8 as a whole are discussed.[38] The overall objectives of Proposition 8 may be applied to the individual provisions of the initiative.[39] All three arguments in favor of Proposition 8 discuss the problem of high crime rates and violence:[40] "It is time for the people to

take decisive action against violent crime,"[41] "Crime has increased to an absolutely intolerable level,"[42] "Your 'Yes' vote on Proposition 8 will restore victims' rights and help bring violent crime under control."[43] These statements indicate that the intent of the voters in passing Proposition 8 was to fight back against crime. This overall intent may be applied to the safe schools provision thus leading to the conclusion that the voters desired school campuses to be free from crime and violence.

The above interpretation is amply supported by the California Supreme Court's recent ruling in *Brosnahan v. Brown.*[44] The *Brosnahan* court ruled that Proposition 8 did not violate the single subject rule of the California Constitution.[45] The court also declared that article I, section 28, subdivision (c), the safe schools provision, was intended to encompass safety only from criminal behavior.[46] The new constitutional right to safe schools is designed to protect students and staff from crime and violence while attending public schools.[47] The next section is a discussion of how this right will be enforced.

Enforceability of the safe schools provision

Some school officials view the safe schools provision simply as a policy statement. A policy statement itself does nothing active toward fighting crime on school campuses, and this interpretation is contrary to the intent of the voters, as postulated in the previous section, that schools be free from crime and violence. This section will show the safe schools provision mandates that school districts have an affirmative duty to make their schools safe.

A. An affirmative duty to make schools safe

Courts will play a very important role in enforcing the inalienable right to safe schools since the function of a court is to interpret the Constitution and define the constitutional rights of citizens of this state.[48] Additionally, courts must vigorously protect the rights embodied in the safe schools provision as the duty of the courts is to guard those rights created by the people through their reserved powers of initiative and referendum.[49] To protect the constitutional right of students and staff of public schools to attend safe, secure and peaceful campuses, the courts must find that school districts have an affirmative duty to make their schools safe.[50]

A major obstacle to imposing an affirmative duty on school districts is the provisions of the California Constitution generally placing restrictions upon the powers of the state.[51] In the context of inalienable rights, this principle may be understood to mean that inalienable rights, embodied in the Constitution, are merely guaranteed against state impairment.[52] Accordingly, the inalienable right to safe, secure and peaceful campuses would not be violated until the state acted to deprive students and staff of their right to safe, secure and peaceful campuses.[53]

This interpretation, however, would not adequately guarantee the right to be

free from violence and crime on school campuses since inaction has been recognized as a significant cause in the increase of crime on school campuses.[54] In 1980, a task force of the Association of California School Administrators (hereinafter referred to as ACSA) made a study of student discipline problems, including violence and vandalism, and discovered that school districts actually contributed to the problem because of their inaction.[55] While most school boards are genuinely outraged at poor student behavior and violent acts, they do not consider themselves responsible for eliminating the problem.[56]

Asa Reeves, 1981 urban services executive at ACSA, is opposed to the view that school boards have no responsibility to make their schools safe:

> *Our inaction contributed to the lack of discipline and allowed violent acts to become a part of the school environment. . . . [We] cannot wait for the attorney general, the probation department, the courts or the Legislature to solve the problem but instead must take matters into our own hands.*[57]

This point of view is embodied in the safe schools provision as ascertained through rules of interpretation.[58]

1. An affirmative duty by interpretation

Imposing an affirmative duty on school districts to make their schools safe may be based on rules of constitutional construction. One long recognized rule is that new provisions must be considered in reference to the prior state of the law and the mischief intended to be remedied by the new provisions.[59] Another established rule of construction is that constitutional enactments must be given a practical, common sense construction which will meet changed conditions and the growing needs of the public.[60]

An examination of the law prior to the enactment of Proposition 8 reveals that school officials do have some responsibility to protect the safety of students and staff members of public schools.[61] School officials have a duty to maintain an orderly campus so the education, teaching and training of students may be accomplished in an atmosphere of law and order.[62] Pursuant to this duty, the school official may suspend, expel, or exclude from school students who have displayed behavior inimical to the welfare of other students.[63] The behavior that merits suspension, expulsion or exclusion must be criminal or violent in nature.[64] Although the authority to rid schools of students who commit criminal or violent acts appears to work directly on removing crime and violence from school campuses, the provisions which govern the suspension, expulsion and exclusion of students from school are only grants of authority to school officials to rid their schools of students who have already committed violent or criminal acts or who have already displayed vicious characters.[65]

Some provisions do place a duty on school officials to guard against student misconduct. For example, the school official has a duty to prescribe rules for governing the discipline of students.[66] The Code providing for this duty was

amended in 1977 to place a duty on the principal of a high school to make sure that students are informed of the disciplinary rules at the beginning of each school year.[67] Creating and communicating a clear, concise policy on student misconduct is instrumental to the control of violence and vandalism on school campuses.[68] The 1980 ACSA task force discovered most school districts either had no policies on student misconduct or had not communicated existing policies to the people most affected.[69]

The state of the law prior to the enactment of the safe schools provision includes no active program to rid schools of crime and violence.[70] The suspension, expulsion and exclusion laws which deal specifically with criminal and violent acts are merely grants of authority to suspend, expel or exclude students *after* the act has occurred.[71] This passive method of dealing with violence and crime may not be adequate today when theft, arson, rape, murder and drug dealing are common events on school campuses.[72] Indeed, juvenile arrests doubled between 1964 and 1974 and continued to increase throughout the 1970's.[73] From 1974 to 1978 the number of juvenile deaths due to homicide alone increased 107 percent.[74]

The evils sought to be remedied by the safe schools provision are crime and violence.[75] A construction of the safe schools provision allowing school districts to do no more than they are doing now will not further the intent of the voters who approved this provision.[76] While the suspension and expulsion laws are designed to rid the schools of students who have violent or criminal natures,[77] those laws are not effective until after the criminal or violent act has occurred.[78] Also, even though school officials already have a duty to create and communicate clear disciplinary policies for students,[79] this duty does not appear to be strictly implemented.[80] A logical conclusion is that the voters desired a strong affirmative duty to be placed on school officials to prevent crime and violence on school campuses.

This construction is a practical and common sense interpretation of the safe schools provision and will meet the changed conditions and the growing needs of the public. As one commentator suggested, school district inaction actually promotes violence and vandalism on school campuses.[81] If the mandate of the safe schools provision is to prevent crime and violence, a common sense interpretation would require the school district to act.[82] The safe schools provision should be interpreted to mandate that an affirmative duty be placed on school districts to make their schools safe. Federal and California case law supports this interpretation.[83] Federal case law intimates that a public entity may be obligated to act in order to protect constitutional rights.[84] The next section discusses the applicability of this principle to California school districts.

2. An affirmative duty by analogy to federal case law

The idea that a public entity has an affirmative duty to protect constitutional rights is not new to the courts. In a dissenting opinion of a 1951 United States

Supreme Court case, Justice Black argued that policemen had a duty to protect a speaker from a hostile audience in order to allow the speaker to exercise his first amendment rights.[85] This, of course, is contrary to the principle that constitutional rights are merely guaranteed against government interference.[86] Federal courts, however, have subscribed to the idea that the public entity must affirmatively act to protect constitutional rights when nonaction causes a deprivation of those rights.[87]

This principle was applied by the United States Supreme Court in *Terry v. Adams*.[88] In Texas, a private association called the Jaybird Party excluded all black voters of the county from being members.[89] Each election year, the Jaybird Party elected people who were to enter the Democratic primaries for nomination to run for county offices in the county elections.[90] The people who were elected by the Jaybird Party to run in the Democratic primaries were invariably nominated to run for county offices.[91] The Court held the state was responsible for the actions of the Jaybird Party in discriminating against blacks even though the association was not controlled by the state.[92] The Court then held the state was obligated to protect the constitutional rights of black voters although the Jaybird association, rather than the state, was actually responsible for the infringement of the voter's rights.[93]

Other federal cases have held that state protection of constitutional rights may not be withheld. In *Lynch v. United States*,[94] a state sheriff surrendered a prisoner to a mob of Ku Klux Klansmen who proceeded to beat the prisoner.[95] The court of appeals held that the prisoner's right to equal protection included the right of protection by the arresting officer against injury by third persons.[96] Although in *Lynch*, under the cause of action used, the sheriff had to have intended to deprive the prisoner of his rights,[97] the court recognized that denial of constitutional rights could be brought about by official inaction.[98] In this case, where the sheriff's action was necessary to protect the prisoner, the sheriff was not allowed to deny protection willfully.[99] In a similar factual setting, the circuit court in *Catlette v. United States*[100] held that a sheriff, who had detained Jehovah's Witnesses, after they had requested protection while carrying on their work, could not deny protection to the Jehovah's Witnesses from a town mob.[101] In failing to protect the Jehovah's Witnesses from group violence, the sheriff denied them equal protection of the law.[102]

A school district certainly may argue that these federal cases are inapplicable to the school district because it has not intended to deny to students and staff members of public schools any constitutional right as did the sheriffs in *Catlette* and *Lynch*. A crucial fact in those cases, however, was that the sheriffs did have the power to afford protection to their detainees, yet in both cases protection was not attempted. A school district has the authority to protect its students' health and welfare just as the sheriffs had the authority to protect their detainees.[103] If a school district may, by simple action, successfully protect students against violence,[104] then the district should not be allowed

to refuse to protect students and staff members. Inaction by the school district violates the constitutional right of students and staff to be safe from crime and violence while attending school. This conclusion is consistent with the holdings of *Catlette* and *Lynch* that the sheriffs' inaction was a deprivation of their detainees' constitutional rights.

The United States Supreme Court and the federal circuit courts have evidenced the position that when government action could prevent a deprivation of federal constitutional rights, action should not be denied.[105] California courts have also subscribed to this position. The California Supreme Court has ordered the California Legislature to reapportion itself to protect voters' rights[106] and certain California school districts to desegregate to protect students' rights.[107]

3. An affirmative duty by analogy to California case law

The California Supreme Court proscribed government inaction in *Legislature v. Reinecke*,[108] (hereinafter referred to as *Reinecke I*). The court found the legislative apportionment in 1972 violated the constitutional principle of one man, one vote.[109] The Legislature was required to enact valid reapportionment statutes in time for the 1972 elections.[110] The California Supreme Court retained jurisdiction over the subject matter to draft reapportionment plans itself in the event that the Legislature failed to adopt plans for the 1974 through 1980 elections.[111] The Supreme Court later adopted apportionment plans pursuant to its retained jurisdiction in a second *Legislature v. Reinecke*[112] (hereinafter referred to as *Reinecke II*). Although the Legislature is required by the California Constitution to reapportion itself after a ten year census, the *Reinecke* cases stand for the idea that when citizens' constitutional rights are in jeopardy, the court will not tolerate inaction.[113]

In *Reinecke I*, the court recognized that reapportionment was solely a job for the Legislature and only after the court recognized that reapportionment might not occur in time for the 1972 elections did the court itself provide the action to protect the voters' equal protection rights.[114] If the court is willing to get involved in a job left to the Legislature, the court must feel strongly about protecting constitutional rights and will not hesitate to order government action.[115] A logical conclusion is that the court will also not tolerate inaction on the part of school districts, especially when protection of students is in the province of the school district, and will not hesitate to order the school districts to make schools safe.

Other public officials besides legislators have a duty to prevent violations of California citizens' constitutional rights. A current body of constitutional law holds that a criminal defendant is denied equal protection and due process of the law at his indictment when there has been an intentional exclusion from the grand jury of a particular class of persons in the community.[116] Public officials who compile jury lists are constitutionally restrained from excluding whole

classes of people in the community from the lists.[117] These official compilers, however, must do more than merely avoid purposeful discrimination. They have an affirmative duty to insure the procedures used to select potential jurors actively work toward achieving a well balanced cross-section of the community.[118] The affirmative duty to remedy discrimination is not limited to public officials compiling jury lists. The school official also has a duty to remedy discrimination.

The strongest support for imposing a duty of school districts to make their schools safe is found in school desegregation cases.[119] In 1954, the United States Supreme Court ruled that segregated school systems violated the Equal Protection Clause of the United States Constitution.[120] In a series of cases the Court began to order school districts to implement plans designed to rid the school systems of segregation.[121] The Court finally decided in *Green v. County School Board*[122] that school boards have the duty to devise a plan to desegregate their schools without delay.[123] The California Supreme Court has similarly ruled that segregated school systems in this state violate the Equal Protection Clause of the Constitution.[124]

Pursuant to a finding that segregation violates the equal protection clause, the California Supreme Court in *Crawford v. Board of Education*[125] held that school districts are obligated to undertake reasonable steps toward alleviating school segregation.[126] The court also held that the school district did not have to be the cause of the segregation.[127] The rationale of this decision is two-fold. First, segregated schools have traditionally had a detrimental effect on minority children,[128] and second, in the state of California education is a fundamental right which should not be impaired.[129]

If the courts may order a school district to take steps to alleviate segregation in the school system, the courts should also order the school district to take steps to alleviate crime and violence on school campuses. Crime and violence certainly have a harmful effect on the education process as does segregation.[130] Segregation impairs the learning process by impeding academic achievement of the minority student.[131] Crime and violence, because of the fear they create in students, impede the academic achievement of all students.[132] Another aspect of the *Crawford* court's decision to impose an affirmative duty to desegregate was that the school district had plenary authority over the governance of its schools and could adopt nondiscriminatory policies.[133] The school district today also has the authority to govern the safety of students[134] and, therefore, can adopt plans to make schools safe.

One major complaint of school districts may be that school districts do not cause crime and violence on school campuses.[135] This complaint is valid because the cause of juvenile violence and vandalism is generally unknown, and none of the typically named causes of violence is the school district itself.[136] The school districts in the segregation cases also complained that they were not the cause of segregation.[137] The courts, nevertheless, held that the

cause of the segregation was immaterial,[138] and the school district was not relieved of its duty when the cause of segregation was, for example, a racially imbalanced neighborhhod.[139] Pursuant to this reasoning, the courts will be justified in imposing an affirmative duty on school districts to make their schools safe regardless of the cause of the crime and violence.

By placing an affirmative duty on school boards to make their schools safe, the courts would be interpreting the safe schools provision in a practical, common sense manner. This would certainly further the intent of the voters who approved the safe schools provision.[140] In addition, an affirmative duty on school boards comports with the principle espoused in federal and state cases that public entities should take action to protect constitutional rights if inaction by the entity deprives people of a constitutional right.[141]

Damages as a remedy for deprivation of the right to safe schools

The safe schools provision does not specify a particular remedy for a violation of its terms.[142] This, of course, does not mean that a remedy is not available. If a constitutional provision is self-executing, for example, injunctive relief is available without legislation providing a remedy.[143] Since the safe schools provision is self-executing, at least injunctive relief is available against the school district when it violates the constitutional rights of students and staff. An injunction may be prohibitory, when the school district would be ordered to refrain from violating the right, or mandatory, when the school district would be ordered to take affirmative action to cure the violation.[144] A mandatory injunction imposed on the school districts to protect students and staff against crime and violence is an appropriate remedy.

Courts have already manifested an intent to order school districts to protect the constitutional rights of students in the school desegregation cases. In *Crawford v. Board of Education*[145] the California Supreme Court stated the school district had an obligation to undertake reasonably feasible steps to alleviate school segregation.[146] The court also stated when the school board could not demonstrate an immediate commitment to instituting such steps, the court would intervene to protect the constitutional rights being violated.[147] The intervention would be formulating a plan to alleviate segregation which the school district would be ordered to adopt.[148]

If the courts are willing to grant a mandatory injunction ordering the school district to desegregate, then they also ought to grant a mandatory injunction ordering the school district to make its schools safe. This remedy is certainly consistent with the mandate of the safe schools provision that school districts must make their schools safe.[149] The effect of such a mandatory injunction, then, is that the school district must undertake reasonably feasible steps to alleviate crime and violence on school campuses.[150] If the school district fails to implement any steps, the courts will intervene and impose their own plan for alleviating crime and violence on school campuses.[151]

This remedy of injunctive relief and judicial intervention is not the only method for vindicating a violation of the constitutional right to safe schools. There is no guarantee that a school district will implement even a court ordered plan, or if the district does implement a plan, that the district will adequately carry out the plan's measures. Another remedy available to the student and staff member of a public school, then, is damages. Damages may be afforded under two theories, a tort and a constitutional theory.

A. The tort claims act

As previously discussed, the tort liability of a governmental entity, either at the state level or local level, is governed by the Tort Claims Act.[152] Section 815(a) of the Tort Claims Act states that a public entity is not liable for the negligence of the public entity or a public employee unless a statute so provides.[153] Thus, for the school district to be liable for damages, a specific statute needs to be found that sets forth the liability.[154]

In the school safety situation, the school district may be liable for damages under the Tort Claims Act, section 815.6.[155] This section provides that when the public entity has a mandatory duty imposed by an enactment to protect against a particular kind of injury, the public entity is liable for any injury that proximately occurs by its failure to carry out the duty unless the entity has used reasonable diligence to carry out the duty.[156] The California Law Revision Commission interpreted this section to mean that when a statutory or regulatory standard is not adhered to, negligence occurs unless there has been reasonable diligence to comply with the standards.[157]

The safe schools provision is not a statute or a regulation; nevertheless, section 815.6 may apply. The first requirement of section 815.6 is that a mandatory duty be imposed on a public entity by an enactment.[158] A school district is certainly a public entity as contemplated by the Tort Claims Act.[159] The question remains whether the safe schools provision is an enactment which imposes a mandatory duty.

Section 810.6 of the Tort Claims Act defines enactment as a "constitutional provision, statute, charter provision, ordinance or regulation."[160] The safe schools provision is a constitutional provision and is, therefore, an enactment as contemplated by the Tort Claims Act. "Mandatory," as defined by this section, refers to duties which the public entity must perform and not to those powers which the public entity may or may not choose to exercise.[161] The safe schools provision as a constitutional provision is mandatory by definition.[162] If the courts impose an affirmative duty on school districts to make their schools safe, the first requirement of section 815.6 will be met. The school district has a mandatory duty to make schools safe imposed by an enactment, the safe schools provision.

The second requirement is that the enactment be designed to protect against a particular kind of injury.[163] The most obvious type of injury the safe schools

provision is designed to prevent is injury to students and staff members of public schools due to crime or violence.[164] The injury would not be limited to injuries due to attacks upon the physical person of students and staff members.[165] The injury could also be damage to or loss of property due to crime and violence.[166]

The last requirement of section 815.6 is that the contemplated injury did occur and the injury was proximately caused by failure of the public entity to discharge its duty.[167] The school district, then, could be liable for injuries to students and staff members caused by crime and violence if the school district failed to carry out its duty to make schools safe.[168] The school district, as provided in section 815.6, may avoid this liability for injuries due to crime and violence only if the district establishes that it exercised reasonable diligence to make schools safe.[169]

A student or staff member of a public school may recover damages from the school district if he proves the school district failed to discharge its duty to make schools safe or failed to use reasonable diligence to discharge its duty and if he proves he is injured as a proximate result of the school district's failure. The damages recoverable under this theory are compensatory only, as section 818 exempts a public entity from punitive damages.[170] A student or staff member, however, need not resort to a theory of negligence to recover damages for a violation of his constitutional right to safe schools.

B. Constitutional remedy

To recover damages against the state under a negligence cause of action, a specific statute must allow the action.[171] In California, however, enabling legislation is not necessary to recover damages for constitutional deprivations.[172] The principle that a cause of action for damages arises from a violation of California constitutional rights was subscribed to by the appellate court in *Melvin v. Reid*.[173] The court determined that the appellant's fundamental right to pursue and obtain happiness was directly invaded and the invasions must not be tolerated.[174] Appellant's action, which included a count for damages, was allowed to proceed despite the trial court's judgment of dismissal.[175]

The appellate court, in *Porten v. University of San Francisco*,[176] reaffirmed the principle that constitutional provisions afford a cause of action for damages. Porten's complaint, which included a request for damages,[177] was dismissed without leave to amend for failure to state a cause of action for the tort of invasion of privacy.[178] The California Constitution, however, declares the right to pursue privacy is an inalienable right.[179] The court held the right to privacy was self-executing and, therefore, conferred a "judicial right of action on all Californians."[180] Porten's complaint was construed as having stated a cause of action under the constitutional right, and the court overruled the dismissal.[181]

While the court in *Porten* did not specifically state that damages were an

appropriate remedy, the court in *Laguna Publishing Co. v. Golden Rain Foundation*[182] left no doubt that a right to sue for damages is appropriate where a constitutional right is violated.[183] In this case the constitutional right in question was California Constitution, article I, section 2, the free speech clause.[184] The court of appeal held that the right to free speech and press deserved as much special consideration as the inalienable rights and stated that an action for damages was appropriate without enabling legislation.[185]

The safe schools provision should also afford a cause of action for damages without enabling legislation. The right to safe, secure and peaceful campuses is an inalienable right[186] as are the right to privacy[187] in *Porten* and the right to pursue and obtain happiness[188] in *Melvin*. The determination that the safe schools provision affords a cause of action for damages means only that the person whose right is violated may present evidence at trial of damages sustained as a result of the violation of the right to safe schools.[189] As stated in *Laguna*, the damages suffered would have to be actual, demonstrable, and compensatory.[190]

The student or staff member of a public school need not rely on an enabling statute, like section 815.6 of the Tort Claims Act, to recover damages for a violation of his right to a safe, secure and peaceful campus.[191] A cause of action for damages arises from the constitutional provision for safe schools itself.[192] In order to recover under the constitutional cause of action, the student or staff member must be able to demonstrate that actual and compensatory damages resulted from the violation of his constitutional right.[193] This right to present evidence of damages may not be denied by the courts on the grounds that no statute specifically allows a remedy of damages.[194]

Conclusion

In June 1982, California voters manifested a desire to fight crime and violence on school campuses by amending the California Constitution to include the inalienable right to safe schools.[195] To enforce this right, California courts will impose an affirmative duty on school districts to implement plans designed to alleviate crime and violence on school campuses.[196] By deferring to the school district's judgment, the courts will assure that the most appropriate and effective methods in ridding school campuses of crime and violence will be used.[197]

School districts have used various methods successfully to prevent crime and violence on school campuses.[198] Some of these methods are very costly; however, lack of finances will not be allowed by the courts as a defense to implementing measures to fight crime and violence. When inadequate funds do become a problem, the school official should consider less costly measures as a restructuring of school policies on discipline. A clear, concise and strictly enforced policy of student discipline has been found to have a positive effect on reducing school violence and vandalism.[199] Many programs of national acclaim have been designed to reduce crime and violence on school campuses, and

through similar methods California school districts may successfully discharge their duty to make schools safe.[200]

Through the combined efforts of the school district and the courts, the safe schools provision will certainly be more than a mere policy statement. A policy of desiring campuses to be free of crime and violence is, of course, valid, but that policy must be enforced by action. This is why the courts must impose an affirmative duty on school districts to make their schools safe.[201] The right to safe, secure and peaceful campuses is a viable, enforceable right designed to rid California schools of crime and violence so a secure and orderly educational environment may be restored to teachers and students.

Endnotes

1. *L.A. Daily J.*, Sept. 7, 1982, at 1, col. 2.
2. *See* Cal. Voter Pamphlet, Primary Election, June 1982, at 34 (copy on file at the *Pacific Law Journal*).
3. A "Victims' Bill of Rights," *Newsweek, June 14, 1982, at 64.*
4. *See id.*
5. Schrag, "Crime on the Ballot," *The New Republic*, June 2, 1982, at 10, 11.
6. *See* A "Victims' Bill of Rights," *supra* note 3, at 64.
7. *See* Cal. Voter Pamphlet, *supra* note 2, at 34.
8. *See* Cal. Const. art. I, § 28.
9. *See id.*
10. *Id.* § 28(c).
11. *Id.*
12. *L.A. Daily, J.*, Apr. 7, 1982, at 2, col. 5.
13. Cal. Const. art. I, § 28(c).
14. *See id.*
15. *See generally*, 13 Cal. Jur. 3d *Constitutional Law* §§ 35-40 (discusses the methods of interpreting constitutional language).
16. *State Board of Education v. Levit*, 52 Cal.2d 441, 462, 343 P.2d 8, 20 (1959).
17. *Id.*
18. *See* Cal. Const. art. I, § 28(c).
19. *Black's Law Dictionary* 683 (5th ed. 1979).
20. *See id.* (definition of inalienable); *see also infra* notes 21-23 and accompanying text.
21. *See People v. Washington*, 36 Cal. 658, 662 (1869) (overruled on other grounds in *People v. Brady*, 40 Cal. 198); *see also* 13 Cal.Jur.3d *Constitutional Law* § 223 (1974).
22. *See* Cal. Const. art. I § 1.
23. *In re Quarg*, 149 Cal. 79, 80, 84 P. 766, 766 (1906).
24. *See supra* notes 18-23 and accompanying text.
25. *See supra* notes 18-24 and accompanying text.
26. *Webster's Third New International Dictionary* 1998 (1971).
27. *See id.*
28. *Id.* at 780.
29. *Id.* at 620.
30. *See infra* notes 32-44 and accompanying text.

31. *See Brosnahan v. Brown*, 32 Cal.3d 236, 240, 651 P.2d 274, 276, 186 Cal. Rptr. 30, 32 (1982).
32. Assembly Committee on Criminal Justice, Analysis of Proposition 8, (1982) (report to the California Legislature of 1982).
33. *Id.* at 7.
34. *See People v. Seely*, 66 Cal.App.2d 408, 412, 152 P.2d 454, 456 (1944); *see also* 42 Cal.Jur.3d *Law Enforcement* § 57 (1974).
35. *See supra* notes 32-34 and accompanying text.
36. *Mosk v. Superior Court*, 25 Cal.3d 474, 495, 601 P.2d 1030, 1045, 159 Cal. Rptr. 494, 509 (1979).
37. *See* Cal. Voter Pamphlet, *supra* note 2, at 34-35 (written arguments on Proposition 8).
38. *See id.*
39. *See Brosnahan v. Brown*, 32 Cal.3d at 247, 651 P.2d at 280, 186 Cal. Rptr. at 36.
40. *See* Cal. Voter Pamphlet, *supra* note 2, at 34 (written arguments on Proposition 8).
41. *Id.*
42. *Id.*
43. *Id.*
44. 32 Cal.3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).
45. *Id.* at 253. The California Constitution provides that initiative measures submitted to electors must embrace only one subject or the initiative will be deemed to have no effect. Cal. Const. art. II, § 8, subd. (d). Although Proposition 8 had ten sections, the Brosnahan court held that all sections shared a common purpose of promoting the rights of crime victims; therefore, the initiative satisfied the single subject rule. 32 Cal.3d at 247.
46. *Id.* at 248.
47. *See supra* notes 26-46 and accompanying text.
48. *Nougues v. Douglas*, 7 Cal. 65, 70 (1857); *see also* 13 Cal.Jur.3d *Constitutional Law* § 96 (1974).
49. 32 Cal.3d at 241, 651 P.2d at 277, 186 Cal. Rptr. at 33.
50. *See infra* notes 51-141 and accompanying text.
51. *See Methodist Hosp. v. Saylor*, 5 Cal.3d 685, 691, 488 P.2d 161, 164, 97 Cal. Rptr. 1, 5 (1971); *see* 13 Cal.Jur.3d *Constitutional Law* § 223 (1974); *see also id.* § 224.
52. *See supra* note 51.
53. *Id.*
54. Reeves, "We Let It Happen ¢ We Can Change It," *Thrust, Oct. 1981, at 8, 9.*
55. *Id.*
56. *Id.*
57. *Id.* at 10.
58. *See infra* notes 59-82 and accompanying text.
59. *People v. Stephens*, 62 Cal. 209, 233 (1882).
60. *Cooperrider v. San Francisco Civil Serv. Comm'n*, 97 Cal.App.3d 495, 502, 158 Cal. Rptr. 801, 805 (1979).
61. *See infra* notes 62-67 and accompanying text.
62. *In re Donaldson*, 269 Cal.App.2d 509, 512, 75 Cal. Rptr. 220, 222 (1969).
63. *See* Cal. Educ. Code §§ 48904.5, 48211.
64. A student may be suspended or expelled for nine acts. *See id.* § 48900(a)-(i). Six of the nine acts are criminal or violent in nature. *See id.* § 48900(a)-(f). The student may be excluded from school for displaying filthy or vicious habits. *Id.* § 48211.

65. *See generally, id.* § 48900. From the language in the Code it is obvious the student's misconduct must have already occurred. Also, the Code does not say a principal shall suspend, which indicates suspension is a discretionary duty.
66. *Id.* § 35291.
67. *Id.*
68. Reeves, *supra* note 54, at 10.
69. *Id.* at 9.
70. *See infra* notes 71-80 and accompanying text.
71. *See* Cal. Educ. Code § 48900(a)-(f).
72. Patsey, "Curbing Violence and Vandalism in Our Schools: A Judicial View of What Must Be Done," *Thrust*, Oct. 1981, at 11; *see also* Cal. Dep't of Justice, *Law in the School*, at 14 (3d ed. 1980) [hereinafter cited as *Law in the School*].
73. *See* Deukmejian, *Preface* to Cal. Dep't of Justice, *Law in the School*, at v (3d ed. 1980) [hereinafter cited as Deukmejian].
74. *Id.* at vi.
75. *See supra* notes 32-47 and accompanying text.
76. *See* Reeves, *supra* note 54, at 9. The intent of the voters is to rid the schools of crime and violence. When the school districts do not actively fight those evils, this intent of the voters is thwarted, especially when the inaction may be said to be a cause of the crime and violence.
77. *See* Cal. Educ. Code § 48900; *see also id.* § 48904.5.
78. *See supra* note 65.
79. *See* Cal. Educ. Code § 35291.
80. *See* Reeves, *supra* note 54, at 9. The task force found that most school districts had no disciplinary policies.
81. *Id.*
82. When school districts have actively sought to prevent crime and violence on school campuses they have been successful. The Hayward Unified School District was able to reduce crime by using a computer monitor system. Harris, "Cramping Your Arsonist's Style and Cutting Energy Costs ¢ All by Computer," *Thrust*, Oct. 1981, at 18. Los Angeles Unified School District has implemented a program which links the juvenile court, district attorney and public defender offices with the school system in order to identify violence prone juveniles and help them to adjust to normal school life. Thompson "Vandalism ¢ Cutting Techniques that Worked For Us," *Thrust*, Oct. 1981, at 13.
83. *See infra* notes 85-118 and accompanying text.
84. *See infra* notes 85-105 and accompanying text.
85. *Feiner v. New York*, 340 U.S. 315, 327 (1951) (Black, J., dissenting).
86. *See supra* note 51.
87. *See infra* notes 88-105 and accompanying text.
88. 345 U.S. 461, 465 (1953).
89. *Id.* at 463.
90. *Id.*
91. *Id.*
92. *See id.* at 469.
93. *Id.*
94. 189 F.2d 476 (5th Cir. 1951).
95. *Id.* at 480.
96. *Id.* at 479.
97. *Id.* at 480.
98. *Id.* at 479.
99. *Id.*

100. 132 F.2d 902 (4th Cir. 1943).
101. *Id.* at 907; *see also id.* at 903.
102. *Id.* at 907.
103. *See* Cal. Educ. Code § 44807. This is one method whereby the school officials may protect students' health. Other methods are the power to suspend and expel. *See id.* § 48900; *see also id.* § 48904.5.
104. *See* Reeves, *supra* note 54, at 10 (simple communication of a disciplinary policy proves successful in cutting crime and violence).
105. *See supra* notes 85-104 and accompanying text.
106. *See Legislature v. Reinecke*, 6 Cal.3d 595, 598, 492 P.2d 385, 387, 99 Cal. Rptr. 481, 483 (1972).
107. *See Crawford v. Board of Education*, 17 Cal.3d 280, 284, 551 P.2d 28, 30, 130 Cal. Rptr. 724, 726 (1976).
108. *See* 6 Cal.3d at 598, 492 P.2d at 387, 99 Cal. Rptr. at 483.
109. *Id.* at 601, 492 P.2d at 387, 99 Cal. Rptr. at 485.
110. *Id.* at 603, 492 P.2d at 391, 99 Cal. Rptr. at 487.
111. *Id.* at 604, 492 P.2d at 391, 99 Cal. Rptr. at 487.
112. *See* 10 Cal.3d 396, 400-401, 516 P.2d 6, 8-9, 110 Cal. Rptr. 718, 720 (1973).
113. 6 Cal.3d at 598, 492 P.2d at 387, 99 Cal. Rptr. at 483. In *Reinecke I*, the court threatened to use its power to impose reapportionment plans to ensure voter equality. The court carried out the threat in *Reinecke II*.
114. 6 Cal.3d at 598, 492 P.2d at 386-87, 99 Cal. Rptr. at 482.
115. *See id.*
116. *See People v. Superior Court*, 38 Cal.App.3d 966, 970, 113 Cal. Rptr. 732, 735 (1974).
117. *Id.* at 972, 113 Cal. Rptr. at 736.
118. *Id.*
119. *See generally, Jackson v. Pasadena City School Dist., 59 Cal.2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963); Crawford v. Board of Education*, 17 Cal.3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976).
120. *Brown v. Board of Educ.*, 247 U.S. 483, 495 (1954).
121. *See* J. Nowak, R. Rotunda, J. Young, *Handbook on Constitutional Law* 564-66 (1978).
122. 391 U.S. 430 (1968).
123. *Id.* at 438-39.
124. *Jackson v. Pasadena*, 59 Cal.2d 876, 880, 382 P.2d 878, 880-81, 31 Cal. Rptr. 606, 608-09 (1963).
125. 17 Cal.3d 280, 130 Cal. Rptr. 724, 551 P.2d 28, 130 Cal. Rptr. 724 (1976).
126. *Id.* at 302, 551 P.2d at 42, 130 Cal. Rptr. at 738.
127. *Id.*
128. *Id.* at 296.
129. *Id.* at 297.
130. Deukmejian, *supra* note 73, at vii; *see also* 17 Cal.3d at 296, 551 P.2d at 38, 130 Cal. Rptr. at 734.
131. *See* 17 Cal.3d at 296, 551 P.2d at 38, 130 Cal. Rptr. at 734.
132. *See* Deukmejian, *supra* note 73, at vii.
133. *See* 17 Cal.3d at 296, 551 P.2d at 38, 130 Cal. Rptr. at 734.
134. *See supra* note 123.
135. *See* Halatyn, "Proper Research is Vital to Cutting School Crime," *Stop Crime*, Winter 1982, at 13.
136. *See* Patsey, *supra* note 72, at 11.
137. *See* 17 Cal.3d at 285, 551 P.2d at 30, 130 Cal. Rptr. at 726; *see also* 59 Cal.2d at 881, 382 P.2d at 881, 31 Cal. Rptr. at 609.

138. 59 Cal.2d at 881, 382 P.2d at 881, 31 Cal. Rptr. at 609.
139. *Id.*
140. *See supra* notes 36-43 and accompanying text.
141. *See supra* notes 85-140 and accompanying text.
142. *See* Cal. Const. art I, § 28(c).
143. See *Laguna Publishing Co. v. Golden Rain Found.*, 131 Cal.App.3d 816, 851 n. 16, 182 Cal. Rptr. 813, 834 (1982), wherein the court holds that the free speech clause is self-executing, and thus, injunctive relief is available without enabling legislation.
144. *Dosch v. King*, 192 Cal.App.2d 800, 804, 13 Cal. Rptr. 765, 768 (1961).
145. 17 Cal.3d 280, 551 P.2d 28, 130 Cal. Rptr. 724.
146. *Id.* at 302, 551 P.2d at 42, 130 Cal. Rptr. at 738.
147. *Id.* at 306-07, 551 P.2d at 45, 130 Cal. Rptr. at 741.
148. *Id.* at 307, 551 P.2d at 46, 130 Cal. Rptr. at 742.
149. *See supra* notes 48-141 and accompanying text.
150. *See* 17 Cal.3d at 302, 551 P.2d at 42, 130 Cal. Rptr. at 738.
151. *See id.* at 307, 551 P.2d at 46, 130 Cal. Rptr. at 742.
152. *Rubino v. Lolli*, 10 Cal.App.3d 1059, 1063, 89 Cal. Rptr. 320, 322 (1970); *see generally* Cal. Gov't Code §§ 810-996 (setting forth the statutes by which the Government may be held liable); *see also* 35 Cal.Jur.3d *Government Tort Liability* § 1 (1974).
153. *See* Cal. Gov't Code § 815(a).
154. *See id.*
155. *See id.*, § 815.6.
156. *Id.*
157. *Id.* § 815.6 (Law Review Commission comment on section 815.6).
158. *See id.* § 815.6.
159. School districts have been held liable for damages under the Tort Claims Act. *E.g.*, *Dailey v. Los Angeles Unified School Dist.*, 2 Cal.3d 741, 747, 470 P.2d 360, 363, 87 Cal. Rptr. 376, 379 (1970).
160. Cal. Gov't Code § 810.6.
161. *Morris v. Marin County*, 18 Cal.3d 901, 908, 559 P.2d 606, 610, 136 Cal. Rptr. 251, 255 (1977).
162. *See* Cal. Const. art. I, § 22.
163. *See* Cal. Gov't Code § 815.6.
164. *See supra* notes 26-47 and accompanying text.
165. *See* Cal. Gov't Code § 810.8 (defining injury under the Tort Liability Act as not limited to physical harm).
166. *See id.*
167. *See id.* § 815.6.
168. *See id.*
169. *See id.*
170. *Id.* § 818.
171. *See supra* notes 152-55 and accompanying text.
172. *See infra* notes 173-94 and accompanying text.
173. 112 Cal.App. 285, 297 P. 91 (1931).
174. *Id.* at 292, 297 P. at 93-94.
175. *Id.* at 292-93, 297 P. at 94.
176. 64 Cal.App.3d 825, 134 Cal. Rptr. 839 (1976).
177. *See id.*, at 827, 134 Cal. Rptr. at 840.
178. *See id.*, at 828-29, 134 Cal. Rptr. at 841.
179. Cal. Const. art. I, § 1.

180. 64 Cal.App. at 829, 134 Cal. Rptr. at 842.
181. *See id.* at 833, 134 Cal. Rptr. at 844.
182. 131 Cal.App.3d 816, 182 Cal. Rptr. 813.
183. *See id.* at 853, 132 Cal. Rptr. at 835.
184. *See id.* at 851, 132 Cal. Rptr. at 833-34.
185. *See id.* at 853, 182 Cal. Rptr. at 835.
186. *See* Cal. Const. art I, § 28(c).
187. *See id.* § 1.
188. *Id.*
189. *See* 131 Cal.App. at 854, 182 Cal.Rptr. at 835. This court is only deciding if the trial court erred in not allowing plaintiff to present evidence at trial.
190. *See id.* at 850-51, 182 Cal. Rptr. at 833.
191. *See supra* notes 171-90 and accompanying text.
192. *See supra* notes 172-90 and accompanying text.
193. *See* 131 Cal.App.3d at 850-51, 182 Cal. Rptr. at 833.
194. *See supra* notes 171-93 and accompanying text.
195. *See supra* notes 36-43 and accompanying text.
196. *See supra* notes 48-141 and accompanying text.
197. *Cf.* 17 Cal.3d at 306, 551 P.2d at 45, 130 Cal. Rptr. at 741. The courts rely on the school districts to devise their own plans to desegregate, for the districts are better able to deal with the complexities involved with the causes of segregation. Presumably, the courts would follow the same pattern for the crime and violence problem since there are also complexities involved with the causes of crime and violence.
198. *See supra* note 82.
199. *See* Reeves, *supra* note 176, at 10.
200. Several programs recently given national acclaim are: "Developing Student Responsibility for Violence on the High School campus" at Alisal High School in Salinas, California; "Southern Oregon Drug Awareness Project" at Medford, Oregon; and "Triad Education" at Elk Grove High School in Elk Grove, California. See National Council of Juvenile and Family Court Judges announcement, January 1983 (List of presentation of awards from "Focus on Youth Symposium," Reno, Nevada) (copy on file at the *Pacific Law Journal*).
201. *See supra* notes 48-141 and accompanying text.

SECTION FOUR

The attorney's role in education

134 ***Education, law and the attorney***
James A. Rapp

142 ***School safety and the legal community***
George Nicholson

As the problems of our schools have become more complex and more blatantly criminal in nature, it seems inevitable that attorneys would be called upon more frequently to offer advice and counsel to embattled school officials, parents and students.

What exactly should the attorney's role be? In practical terms, what has it become? Should attorneys become involved in school policy-making decisions, or should they be called upon as a last resort, only when absolutely necessary? What impact does the expanded role of attorneys and, through them, the courts, have on educational policy? The articles in this section examine some answers to these questions.

Education, law and the attorney

James A. Rapp

Education, in the most basic sense, is a necessity of life by which persons learn from their own experiences and those of others to survive and continue society. American society recognizes a further special importance of education to our democratic society. It is required in the performance of our most basic public responsibilities. It is the very foundation of good citizenship. Thus, education is considered the most important function of state and local governments,[1] and integral to American society.[2]

The education law explosion

The law mirrors the attitudes and temperaments of society. Accordingly, it is not merely coincidental that the importance of education law has magnified dramatically since the 1950's as greater attention was directed toward America's educational institutions and systems due to: the post-World War II baby boom; a national mood of educational consumerism prompted by veterans returning to school; an efficient mass communication media; and the inability or unwillingness of legislatures to address many of the problems facing education.

Seeds of the education law explosion were planted with the 1954 decision of the United States Supreme Court in *Brown v. Board of Education*[3] which declared that segregated public education was inherently unequal and therefore unconstitutional.[4] Since *Brown*, court rulings, flanked by an abundance of legislation, have enforced a national policy which prohibits discrimination on the basis of race, color, national origin, sex or handicap.[5] Further catalyzing the development of the education law explosion was the willingness of the courts to extend due process and other constitutional protections to students in

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their dealings with educational institutions and, in general, to take greater cognizance of disputes arising out of the student-educational institution relationship.[6]

Education law practice
The attorney's role in education

In general

Proper legal representation is essential to the operation of a modern educational institution. Those who are affected by the decision of an educational institution have an increasing proclivity to resort to the courts, and courts are more inclined than ever to listen. Also, the array of laws, rules and regulations which affect an educational institution are staggering. Where the actions and operations of an educational institution have vast legal implications, legal representation is required to deal with them.

While the need for legal representation is obvious, the attorney's role in education is less precise. This role will vary from institution to institution. Thus, some educational institutions treat the attorney as if he were another board member, while others call upon an attorney only as a last resort "when we are in trouble." Neither extreme is an appropriate or effective use of an attorney. While an attorney is not a board member and should not consider himself one, an attorney should be involved as decisions are being made to advise an educational institution of the legal implications of those decisions and to assist in shaping them in the most favorable way possible from a legal perspective.

When providing legal representation, an attorney must be an advocate for autonomy and flexibility in the administration and operation of an educational institution[7] and avoid unnecessarily extending legalistic factors into its affairs.[8] It is always easier and safer for an attorney to advise an institution not to do something for legal reasons.[9] Proper legal representation requires, however, that an attorney more positively advise and assist an educational institution to accomplish its endeavors and goals within legal parameters.

If an attorney is to properly and effectively participate in the decision-making process, an institution's board and administrators must be candid in seeking his assistance and advice. Questions should not be phrased or situations obfuscated so that the "right" answers are obtained. Similarly, the most competent advice available should be sought, rather than going from attorney to attorney for particular answers.[10]

Irrespective of the role of an attorney at a particular educational institution, it is essential for both the educational institution and attorney to recognize that the assistance and advice provided is just that – assistance and advice. Along with other factors, this assistance and advice should be considered in making

decisions. Occasionally, the attorney's opinions may be of preeminent importance and at other times of little or no importance. What is important is that education law be taken into account when making decisions which affect the administration and operation of an educational institution.

Checklist of services provided by attorneys

While it would be impossible to itemize each and every activity which may be a part of the attorney's role in representing an educational institution, typical services performed include those set forth in this checklist.

- ☐ Furnish specific legal opinions on request.
- ☐ Update the educational institution on current education law issues, decisions and laws, as well as their implications for the institution.
- ☐ Prepare or review an educational institution's policies and procedures.
- ☐ Document and supervise elections.
- ☐ Attend meetings of the educational institution's board, committees, staff or students as required.
- ☐ Effecting the acquisition, disposition or lease of real estate.
- ☐ Drafting and review of contracts.
- ☐ Assure compliance with applicable competitive bidding and other contract requirements.
- ☐ Review of insurance policies and coverages.
- ☐ Review and assure compliance of requirements applicable to the collection and expenditure of funds and monies generated by students and local, state and federal sources.
- ☐ Review grant proposals and programs for legal implications and compliance.
- ☐ Prepare or review the educational institution's budget and assure compliance with applicable budget procedures.
- ☐ Documenting and assuring compliance with requirements to borrow funds or issuance of bonds.
- ☐ Responding to inquiries of auditors regarding an educational institution's litigation and contingent liabilities.
- ☐ Analyze the income, employment and other tax requirements of the educational institution and any support organizations or foundations.
- ☐ Bring actions to collect student financial obligations owed to the educational institution.
- ☐ Review the legality of the educational institution's employment practices.
- ☐ Provide advice and counsel regarding the dismissal of faculty and staff members.
- ☐ Review, negotiate or interpret collectively bargained agreements and participate in related grievance procedures.
- ☐ Provide advice and counsel regarding student rights and responsibilities.
- ☐ Provide advice and counsel regarding the suspension of students and the

expulsion of students.
- ☐ Review an educational institution's activities as they relate to possible tort liability.
- ☐ Prosecute and defend litigation brought by or against the educational institution.
- ☐ Provide assistance and advice regarding the maintenance and inspection of education records.
- ☐ Determine the relative rights of the education institution, faculty, staff or third parties to copyrights, patents or trademarks, and assure they are protected or honored, as appropriate.
- ☐ Conduct in-service seminars or programs for board members, faculty, staff and students.

Patterns of legal representation

A variety of patterns of legal representation are available to educational institutions.[11] A traditional arrangement has been the use of an outside attorney or law firm. Larger educational institutions may retain in-house counsel who would either serve full-time as a legal counsel or only part-time, devoting other time to teaching or other unrelated duties for the institution. State law sometimes prescribes that an educational institution is to be represented by the attorney general or some other publicly elected or appointed attorney. Occasionally, a board member is selected because he is an attorney and in connection with his membership is expected to serve as an educational institution's legal counsel.

The most common pattern of legal representation is the use of an outside attorney. Outside counsel is often most economical because an attorney is then retained only when and as needed. This arrangement also allows an educational institution the flexibility to retain separate counsel for specialized matters as they arise, such as civil rights litigation, rather than relying on a single general counsel to be expert in all of the institution's legal matters.

In-house counsel offers the advantages of availability, close supervision of the services performed and, if legal matters warrant, a potential economic savings. An in-house counsel will often, although not always, be more specialized in education law matters than other counsel.[12] A major problem with in-house counsel is a lack of objectivity of judgment. Since the attorney has one client, he tends to interpret situations in the light most favorable to the administration which employs him and may be too close to a problem and the persons involved to give objective legal advice.[13]

Because an attorney general handles the full spectrum of a state's legal problems, the use of the attorney general as counsel to an educational institution is usually considered an undesirable arrangement. The loyalties of the attorney general's staff are always first to the attorney general and only secondarily to

the educational institution.[14] Moreover, education law matters are typically given a low priority by an attorney general and thus his staff typically has little experience or interest in the legal affairs of an educational institution.

The education law explosion has rendered the attorney-board member arrangement entirely unsatisfactory. When legal matters were few and seldom adversarial, this was a viable arrangement. However, as areas of decision making have become more sensitive and complex, no person can objectively and effectively serve in both capacities.

Attorneys' fees and billings

To avoid misunderstandings between an attorney and an educational institution, attorneys' fees and billings should be discussed and the arrangement reached reflected in a retainer agreement or letter before services are performed.[15] The most commonly used method of compensating an attorney for education law services is on a prescribed hourly basis, although some specialized services, such as bond issues, are handled on a lump-sum or percentage basis. Statements are then sent monthly, quarterly or at other intervals.

Some attorneys require and educational institutions are accustomed to paying an initial and annual "retainer" to an attorney. The contract by which a client engages an attorney is called the retainer or retainer agreement.[16] A fee, or retainer, may be paid in connection with that agreement. Unfortunately, many educational institutions treat the retainer as legal insurance and assume it covers all legal services for the period to which it applies.[17] Instead, in most instances, the retainer means pre-paid compensation for services to be performed and against which the attorney bills until exhausted.[18] If a retainer is received, the retainer agreement or letter should clearly state what is intended by the retainer and under what circumstances, if any, it is refundable.[19]

Attorney-client relationship

In representing educational institutions, an attorney is bound by the Code of Professional Responsibility drafted by the American Bar Association and adopted by the Bar of most states.[20] An attorney owes the same level of professional responsibility when representing other clients. Thus, in all professional functions an attorney must be competent,[21] prompt and diligent.[22] The attorney should maintain communication with the educational institution concerning its representation[23] and maintain its confidences.[24]

An ethical issue arising in education law practice is the identity of the client owed allegiance. An attorney has a normal and natural tendency to feel close to those in administrative positions with whom he works, and administrators correspondingly feel that the attorney is their own.[25] Nevertheless, the Rules clarify that an attorney employed or retained by an organization represents that organization,[26] even where a government entity is involved,[27] and not its constituents.[28] In dealing with an organization's directors, officers, employees,

members, shareholders or other constituents, an attorney must explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the attorney is dealing.[29]

Because of the obligation which an attorney has to the organization, he is required to proceed as is reasonably necessary in the best interests of the organization if an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to its representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization.[30] Some commentators have also suggested that an attorney's responsibility requires that he make known his "sense of conscience" when he considers actions morally wrong although perhaps legally justifiable.[31]

An attorney representing an organization is often requested to also represent its constituents. An attorney representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the applicable rules governing conflicts of interest.[32] However, if the organization's consent to dual representation is required, the consent must be given by an appropriate official or the organization other than the individual who is to be represented.[33]

Endnotes

1. *Brown v. Board of Educ.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).
2. *See* Dewey, *Democracy and Education* (1916).
3. *Brown v. Board of Educ.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).
4. *See generally*, § 10.01 *infra* (regarding racial integration).
5. *See generally*, Chapter 10 *infra* (regarding educational opportunities and equality).
6. *See generally*, § 9.01 *infra* (regarding the student-educational institution relationship). *See* Faber, *The Warren Court and the Burger Court: Some Comparisons of Education-Related Decisions.* 10 NOLPE School L.J. 30 (1981).
7. Cleveland, *The Muscle-Bound Academy*, 7 The College Counsel No. 1 (1972).
8. Bickel, *The Role of College or University Legal Counsel*, 3 J. of L. & Ed. 73, 78 (1974). *See also* Orentlicher, *The Role of College or University Legal Counsel: An Added Dimension*, 4 J. of L. & Ed. 511 (1974).
9. Preventive law is commendable, but should not require that things not be done. Rather, it requires that legal problems be anticipated and then their impact evaluated and considered. *See* McClung, *Preventive Law and Public Education: A Proposal*, 10 J. of L. & Ed. 37 (1981). An attorney must be particularly diligent in avoiding to give an opinion that something should not be done for preventive legal reasons merely to impose his personal views on the educational wisdom of the action to be taken.
10. Epstein, *The Use and Misuse of College and University Counsel*, 45 J. of Higher Educ. 635 (1974).
11. *See generally*, McCarty & Thompson, *The Role of Counsel in American Colleges and Universities*, 14 Am. Bus. L.J. 287 (1977). Being a contractual arrangement, the employment of an attorney is subject to the requirements of other contracts

entered into by educational institutions. *See* § 4.02 *infra* (regarding contracts of educational institutions). *See also* Annot., 75 A.L.R.2d 1335 (1961) (regarding the power to employ legal counsel).

12. One major reason for this is that newer attorneys are often attracted to positions as in-house counsel and the turnover rate is high. Also, an in-house counsel may be so specialized in education law that he knows little about other fields which affect the institution, such as litigation and employment discrimination.
13. McCarty & Thompson, *The Role of Counsel in American Colleges and Universities*, 14 Am. Bus. L.J. 287, 301-02 (1977).
14. *See* Corbally, *University Counsel – Scope and Mission*, 2 J. Coll. & U.L. 1 (1974).
15. Such an agreement or letter will be particularly helpful to subsequent board members and administrators.
16. Speiser, *Attorneys' Fees* § 1.1 (1973).
17. For this reason, attorneys have increasingly abandoned the use of retainer fees with educational institutions.
18. Retainer may also mean a fee for an attorney taking a case, making himself available to handle it, and refusing other possible employment. Speiser, *Attorneys' Fees* § 1.1 (1973). Retainer is seldom used in this sense in providing education law services.
19. Often the retainer is billed against, but is not refundable if any balance remains.
20. The Rules were adopted by the House of Delegates of the American Bar Association on August 2, 1983, and replaced its Model Code of Professional Responsibility. The Rules consist of two separate but interrelated parts: Rules and Comments. The Rules are authoritative and generally define conduct for purposes of professional discipline, although some are permissive and define areas under the Rules in which the lawyer has professional discretion. A Comment accompanies each Rule which explains and illustrates the meaning and purpose of the Rule. *See* Model Rules of Professional Conduct, *Preamble: A Lawyer's Responsibilities.*
21. Model Rules of Professional Conduct, Rule 1.1
22. Model Rules of Professional Conduct, Rule 1.3.
23. Model Rules of Professional Conduct, Rule 1.4.
24. Model Rules of Professional Conduct, Rule 1.6.
25. Williams, *The Code of Professional Responsibility and the College and University Lawyer*, 2 J. of Coll. & U.L. 250 (1975).
26. Model Rules of Professional Conduct, Rule 1.13(a).
27. Model Rules of Professional Conduct, Rule 1.13, Comment.
28. Under the Rules, constituents include officers, directors, employees and shareholders and persons in other equivalent positions acting for organizational clients. While the organization is the client, the organization can only act through its duly authorized constituents. Model Rules of Professional Conduct, Rule 1.13, Comment.
29. Model Rules of Professional Conduct, Rule 1.13(d).
30. Model Rules of Professional Conduct, Rule 1.13(b).
    This Rule also provides:

    > In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

If, despite these efforts, the highest authority that can act on behalf of the organization insists upon an action, or a refusal to act, that is clearly in violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with the Rules. Model Rules of Professional Conduct, Rule 1.13(c).

31. Williams, *The Code of Professional Responsibility and the College and University Lawyer*, 2 J. of Coll. & U.L. 248, 251 (1975).

32. Model Rules of Professional Conduct, Rule 1.13(e).

The general rule regarding conflicts of interest is as follows:

(a) A lawyer shall not represent a client if the client will be directly adverse to another client, unless:
(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved. Model Rules of Professional Conduct, Rule 1.7.

33. Model Rules of Professional Conduct, Rule 1.13(e).

School safety and the legal community

George Nicholson

When Massachusetts created America's first state board of education in 1837, that board selected lawyer Horace Mann to serve as the nation's first state superintendent of schools, a post he held with distinction for 12 years. Many outstanding lawyers, judges, and their respective professional associations, have been helping education ever since. Today, when our schools need us more than ever, we should not disappoint them.

This is especially true now that our nation has entered an era of unprecedented litigation. The law has become the vehicle for attempting to settle countless conflicts which formerly would have been resolved by other means.

America's schools, and the people in them, have not been immune from this litigation explosion. Cases involving virtually every aspect of education have been or are currently in court somewhere.

Without debating the merits of injecting courtrooms into classrooms, it is safe to say most educators lack a grasp of the magnitude, import or specifics of this amorphous, and often ad hoc phenomenon. Parents and students are similarly situated. This frequently breeds more conflict and litigation.

It serves no purpose to criticize the courts or lawyers for what they have done. It also serves no purpose to criticize educators, parents and students for their inability to stay abreast of the courts. Our schools, and the people in them, must deal with the legal here and now. How can the legal community help them to do that?

Those in the legal community can best help by becoming more involved in education. Rather than increasing litigation, however, our country's 625,000 lawyers, 24,000 judges, and their respective professional associations, can be

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most helpful by energetically *promoting and participating* in preventive legal programs.

The problem and the challenge

"The problems of American education can be both understood and corrected if the people and their public officials care enough and are courageous enough to do what is required." So declared David Pierpont Gardner, Chairman, National Commission on Excellence in Education in the *Final Report, A Nation at Risk: The Imperative for Educational Reform,* which was submitted to Secretary of Education Terrell H. Bell on April 26, 1983.

A crucial element of quality education is the existence of safe, secure and peaceful school climates. Unfortunately, problems of crime, violence, drug trafficking, truancy, vandalism and discipline often disrupt the safe and orderly processes of learning.

Albert Shanker, president of the American Federation of Teachers, while testifying before the Subcommittee on Juvenile Justice of the U.S. Senate Judiciary Committee in January 1984, declared: "We know there is continuing school violence. Most national studies documenting this are based on statistics gathered in the late '70's, but we know from reports of individual school systems and our own research that the incidents continue at an unacceptable rate." The problems of school safety have become serious enough to gain the personal attention of the President, the Attorney General and the Secretary of Education.

President Reagan put the problem in perspective while speaking to secondary school principals in early 1984: "As long as one teacher is assaulted, one classroom disrupted, or one student is attacked, then I must and will speak out to give you the support you need to enforce discipline in our schools. I can't say it too forcefully, to get learning back into our schools, we must get crime and violence out."

The nation responds

It will take substantive programs, as well as presidential emphasis, to meet the challenges faced by our schools today. The U.S. Departments of Education and Justice are cooperating in the completion of three pilot projects in Rockford, Illinois; Jacksonville, Florida; and Anaheim, California, to find better ways for school districts to use their resources to prevent school crime and violence.[1]

In addition, both departments are cooperating with Pepperdine University to help operate the National School Safety Center (NSSC), a project funded by a two-year grant from the Office of Juvenile Justice and Delinquency Prevention. Headquartered in Sacramento, the Center promotes a continued exchange of information related to school safety and delinquency prevention among school boards, educators, judges, lawyers, law enforcers and other public and private officials, agencies and organizations. The Center pursues a comprehensive

approach to school safety with emphasis on the overriding theme of interagency and multidisciplinary cooperation and partnership.

NSSC was patterned after the California School Safety Center which was formed in the California Department of Justice in 1980 by Governor George Deukmejian who was then the state's attorney general.[2] The California Center promoted a partnership effort between schools and law enforcement to address issues of school safety, crime prevention and improving school climate.[3]

Deukmejian's successor, Attorney General John Van de Kamp, has actively continued the school safety program and, indeed, formalized the education/law enforcement partnership concept through cooperative program efforts with California's Superintendent of Public Instruction Bill Honig and the State Department of Education.[4]

Over the last five years, California and many other states have pursued a number of approaches - including legislation - to address the school safety issue. Bills have been passed ranging from broad education reform including improved disciplinary programs to specific crime-related actions including the curtailment of drug trafficking in and about schools, and increased penalties for campus-related crime. For example, in 1984, a bipartisan coalition of legislators passed and the governor signed, a package of bills called "California Safe Schools Program." The program will (1) increase penalties for campus crimes; (2) require courts to notify school administrators, teachers and counselors of students who have committed violent crimes; (3) require the attorney general to prepare a concise criminal and civil law summary pertinent to campus crime, violence and discipline, and delineate differences between campus crimes and mere disruptive behavior; (4) require standardized reporting of school crime and evaluation of crime prevention programs; and (5) discourage disruptive school campus "outsiders."

With the triad of school safety leadership which has been forged by the President at the national level, and with analogous partnerships of school safety leadership now in place or forming in many of the nation's states, the format has been established to provide positive, cooperative and effective steps to diminish crime, violence, vandalism, disruption and drug abuse in all our nation's schools.

As government officials and legislators throughout the nation pursue more effective school safety laws, school officials continue to act within the restraints of existing law and resources. Individually, however, their effectiveness may be limited. Problems on school campuses usually reflect problems in the community. Therefore, safe, secure and peaceful schools require more than new legislation; they also need the commitment and active cooperation of the entire community: school boards and superintendents, educators, law enforcers, parents, students, business leaders and community members, and the legal community including judges, prosecutors and other attorneys.

Legal community involvement

The legal community, including private attorneys, public prosecutors, defenders, county counsel and judges, as well as their professional associations, are in a unique and potent position to help address school safety issues.

Right to safe schools

There are many evolving legal issues which bear on school safety. In 1980, the California Department of Justice took the unprecedented step of filing a lawsuit against all relevant governmental officials and agencies in Los Angeles County to compel them to enforce safety in the schools.[5]

The theory of the lawsuit was novel. It alleged (1) children in California are compelled by law to attend school; (2) in this respect, their position is analogous to prisoners and mental patients who are involuntarily detained by the state; (3) hence, school children are protected, by the Eighth Amendment of the United States Constitution, against state actions that constitute cruel and unusual punishment; and (4) forcing children to attend crime-infested schools constitutes cruel and unusual punishment.[6]

This lawsuit was dismissed by the trial court and was on appeal when it was, in effect, rendered moot by the 1982 passage of Proposition 8, the Victims' Bill of Rights.[7] To the extent crime and violence invade our campuses, school children are twice-victimized: (1) when they become actual victims of school-related crime, violence, disruption, or fear; and (2) when they are thereby denied their rights to a quality education in a tranquil learning environment. By the sustained presence or potential of campus crime, that essential tranquil learning environment is transformed into an onerous and threatening atmosphere of fear and reality of criminal harm.

The California Constitution, as amended by Proposition 8, now provides in one simple, *mandatory* and *self-executing* provision: "*Right to Safe Schools.* All students and staff of primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful."[8]

Other pertinent legal issues include: (1) the continuing dilemma of how to both fairly and effectively conduct disciplinary proceedings;[9] (2) possible vicarious liability by school districts for harm done to students or staff by third parties or done to third parties by students or staff;[10] and (3) how and when searches and seizures can be conducted in and about schools.[11] Lawyers and prosecutors need to learn much more about relevant legal issues facing educators and law enforcers and then begin to provide help in resolving those issues.

Lawyers' role

Lawyers can provide in-service training for school administrators and other educators on law-related school safety issues and trends. For example, just as

they often conduct or coordinate systematic and comprehensive legal training for themselves and other law enforcers in their jurisdictions, public attorneys (prosecutors, public defenders, county counsel) can provide similar legal training for school personnel. In addition, information about relevant education law developments and trends can be integrated into existing law enforcement training.[12]

Legal professional associations can become active in a variety of other ways: Many of these organizations have legislative committees to identify possible legislation to sponsor, and to evaluate pending legislation sponsored by others. Perhaps a small number of educators could be invited to attend or actually join these committees. Similarly, legal and law enforcement associations can seek membership on the legislative committees of educators' associations.

It would be useful to lawyers, law enforcers and educators to formally establish such ties. Likewise, it would be useful for legal, law enforcement and education associations' legislative committees to confer often with education committees of legislatures.

Legal and law enforcement associations often have active *amicus curiae* (friend of the court) committees. These groups could pursue formal liaisons with similar committees in associations of educators. It could be of great benefit and promote school safety issues if carefully selected, mutually important cases were identified for *co-amici curiae* briefs. Such briefs could then easily be jointly prepared and filed by lawyers from several associations of lawyers, law enforcers and educators. The legal staff of the National School Safety Center has formed a Legal Advisory Council to aid in this effort.

Conferences which are sponsored by professional associations of lawyers, law enforcers, school administrators and other educators can readily be made into opportunities for joint presentations on relevant professional concerns. A notable example is Los Angeles County Superintendent of Schools Stuart Gothold's Annual In-Service Workshop on School-Related Crime, Violence and Vandalism. The program is annually co-sponsored by a long list of education, legal and law enforcement leaders.[13]

In 1984, Gothold's Eighth Annual Workshop was attended by more than 650 educators and law enforcers from throughout the state. At this conference, a panel discussion,[14] "Law in the School: A New Era," explored the significant extent to which law has invaded our schools and the great difficulty with which schools seem to be dealing with that invasion.[15]

One thousand educators, lawyers, and law enforcers attended the Ninth Annual Workshop in 1985. Another related panel discussion,[16] "Who Runs the Schools: Lawyers, Judges or Educators?" was conducted. Active participation by several legal and bar associations occurred for the first time.

Lawyers and their professional associations can also participate in adopt-a-school-type programs which unite an individual school with a law firm or bar association. Lawyers can visit classrooms and interact with students, intro-

ducing them to practical aspects of the law such as civil and criminal law, rights and responsibilities.

Lawyers can also assist in setting up or participating in "experiential learning" situations, where students learn through field trips to the courthouse, the city council or the legislature, while actual proceedings are in progress. Afterward, a question and answer period follows where judges, prosecutors, defense counsel, city council members or legislators answers students' questions. Such law-related education programs promote responsibility, accountability and good citizenship as students gain a clearer understanding of, and more respect for, legal professionals, government and the justice system.[17]

Judges can also play a vital role in establishing and maintaining interagency cooperative efforts in their communities by serving as convenors and facilitators of such groups. As professionals who are trained to be neutral and impartial, judges have the advantage of not being tied directly to any one of the participating agencies and therefore can largely avoid "turf" issues. In addition, judges have sufficient status to gain the attendance and participation of the necessary youth service agencies in their communities. They can convincingly argue the benefits to all cooperating agencies of sharing information and resources, which help reduce costs and avoid duplicated efforts.

Beyond the services mentioned, public prosecutors, as an integral part of the juvenile justice system, can also play leadership roles in helping to shape and implement priorities and commitments.

Through active, persistent involvement in interagency task forces and other collaborative efforts, prosecutors' offices can help promote faster, more flexible and imaginative handling of juvenile justice problems and cases through interdepartmental coordination and cooperation.

Perhaps the most constructive way to demonstrate the potential for leadership within the legal community is to describe the successful efforts of several actively involved agencies and associations.

Effective programs

Florida

In Florida, Governor Robert Graham has launched numerous innovative interagency programs and argued persuasively in favor of a primary prevention approach for the reduction of crime, stating: "The more children we can help to grow up physically healthy, intellectually curious and free from crime, the fewer we will have to arrest, prosecute, adjudicate and incarcerate."

Among Governor Graham's actions has been the creation of the Governor's Constituency for Children. Stressing collaboration between the public and private sectors, this program is a preventive effort to steer children away from formal involvement with the juvenile justice system. The constituency is guided by a State Council which includes among its membership the Commissioner of

Education and the Attorney General. From this collaboration have come a variety of local prevention programs.

Florida has also shown considerable initiative in developing law-related education curricula. Circuit Court Judge Clifton Kelly, a former prosecuting attorney, initiated and supported, in cooperation with the Florida Bar Association, the passage of a 1978 permissive law education program (Fla. Edu. Code, § 233.0615). The statute urged schools to begin teaching students the consequences of breaking the law. Not content to simply sponsor this legislation, Judge Kelly co-authored the program's curriculum. The lesson plans cover a wide spectrum of juvenile crime and place considerable emphasis on the legal consequences of campus drug use and trafficking. To date, more than 70 percent of Florida's school districts have adopted this law-related education program.

Florida's Dade County State's Attorney's Office provided leadership in the formation of an Interagency Consortium dedicated to developing primary prevention programs. The consortium is comprised of representatives from the city government of Miami, the Metro-Dade Police Department, the Department of Human Resources, the Department of Health and Rehabilitative Services and other community-based agencies.

Recognizing patterns of delinquent behavior often begin in late elementary and junior high grades, the consortium initiated an early intervention program for children in kindergarten through fourth grade who exhibit behavioral and emotional problems or are academic underachievers. The consortium has targeted a number of elementary schools in a high poverty section of Miami to receive the program's services. Considerable emphasis is placed on both an after-school remedial education component and a treatment component which focuses on emotional and behavioral problems. A local mental health agency conducts individual and group counseling sessions with these children. Reflecting Dade County's concern for reducing epidemic-level drug use, the treatment component of this program, as one of its objectives, makes a concerted effort to treat the problems and educate these predelinquent youngsters about the dangers of drug abuse.

Ventura County, California

Ventura County, California, may demonstrate the most comprehensive example of interagency cooperation and networking in which lawyers and district attorneys are involved. Numerous interagency groups exist including: (1) the Interagency Juvenile Justice Council through which the district attorney, the superintendent of schools, county counsel, juvenile court judge, superior court judge, sheriff, public defender, chief county administrative officer, social services director, correction services director, public health care director, and a county supervisor, all meet once a month; (2) the Interagency Case Management Council, through which middle management representatives of the same

agencies listed above, meet every two weeks to consider appropriate responses to individual juvenile cases which overlap two or more agencies; (3) the county SARB which addresses truancy issues; and (4) numerous other task forces, subcommittees and public forums which deal with issues such as child abuse, sexual molestation, women's self-protection, school safety and many related issues.

The Ventura County Interagency Juvenile Justice Council establishes the tone and commitment to interagency communication and cooperation from the top. The effectiveness of this leadership is demonstrated by the high priority which interagency approaches receive at every level of program planning throughout the county.

The Ventura County Interagency Case Management Council applies a multi-disciplinary case management approach to specific juvenile cases which have not been adequately resolved by a single agency. Involving the agency representatives listed previously, as well as other primary parties involved in specific cases (SARB, juvenile court judges, private agencies such as Big Brother/Sister, etc.), the council works cooperatively to develop interagency responses to prevent kids from "falling through the cracks" of the system. The participating deputy district attorney is able to keep the council informed about cases as they progress through the courts and, in turn, is often able to provide other deputy district attorneys with information pertinent to their particular caseloads.

A district attorney representative also sits on the county SARB and helps set policy for attendance actions by the county. To make the best use of resources and stay within heavy caseload restraints, the D.A.'s office only files against selected parents on the strongest truancy cases, and solicits extensive media coverage. This sets examples and directs public attention to potential consequences of violating compulsory education laws.

Facilitated by the extensive interagency communication and cooperation among these three ongoing county groups, numerous Ventura County interagency task forces, subcommittees and *ad hoc* groups deal with specific issues, develop "requests for funding proposals" (RFPs), participate in public forums, and generally promote the effective use of countywide resources and efforts.

Chicago

Chicago, Illinois, is another area where a public prosecutor's office has taken the leadership in providing services which range from prevention to diversion. The State's Attorney's Office in Cook County has recently initiated innovative primary crime prevention programs for school children, based on a partnership among community and civic organizations and the State's Attorney's Office. Neighborhood task forces have been formed which send representatives to meet with the state's attorney. In monthly meetings, remedies for community and school problems such as drugs, gang violence and juvenile crime are discussed

and solutions are proposed.

Spinoffs of this partnership have included the purchase of a "law mobile" and the development of a speaker's bureau. Emphasizing crime prevention, the popular law mobile travels to elementary and secondary schools as well as community organizations upon request. The law mobile offers a variety of services, including the provision of legal information, the distribution of films and other audio-visual materials and the sponsorship of special activities and events.

Complementing the activities of the law mobile is the speaker's bureau which is comprised of prosecutors from the State's Attorney's Office. They visit secondary schools during the weekdays to conduct classes and hold assemblies for students, teachers and parents on a variety of law-related topics. They also respond to requests from community groups to make evening presentations on crime issues of local concern. High on the list of requested topics has been drug use and sales in schools. Since the formation of the bureau in 1981, representatives have made over 2,800 separate appearances in Chicago schools and neighborhoods.

Other activities sponsored by the State's Attorney's Office and targeted for use in the war against drugs on campus include the publication of a drug abuse informational booklet and the promotion of a drug abuse poster contest for elementary school students. The booklet entitled *Drugs - Illusion - Reality* was produced collaboratively through the efforts of local drug rehabilitation centers and juvenile court judges and is geared for distribution to parents and teachers.

In a slightly different context, the Chicago Bar Association and the John Marshall Law School, in coalition with the Chicago Public Schools Adopt-A-School Program, have developed a comprehensive program of law education. Supported by a grant from the McDonald's Corporation, the program now reaches every student in Chicago public high schools. The culminating activity is a mock trial competition among the high schools conducted in the Illinois Supreme Court. In addition, the finalists in the competition are eligible for $100,000 in scholarships to John Marshall Law School.

New York

Similarly, the Federal Bar Council and New York Alliance for Public Schools sponsor a "mentor" program which pairs 22 major law firms with 22 public schools (19 high schools and three junior high schools). The firms sponsor five events for the students of their respective "adopted" school including visits to courts, to the law firm, and classroom lectures.[18] (The National School Safety Center is working on this program to help transform it into a national effort. For more information about how you can become involved, please contact the NSSC Legal Section.)

San Diego County, California

San Diego County, California, has taken an even more comprehensive approach. A County Interagency Youth Advisory Committee has been established to discuss relevant issues and devise consistent interagency policies and procedures related to juvenile justice and delinquency prevention. The committee, which is chaired by a deputy district attorney includes representatives from the California Youth Authority, county social services, the juvenile court, county administrator's office, mental health department, and 19 law enforcement agencies including San Diego Schools' Police Services.

Meeting monthly, the committee reviews juvenile justice problems and develops proposals to effectively address them. For example, it devised uniform crime reporting forms and arrest procedures for all law enforcement agencies in the county. A subcommittee on juvenile case processing developed an interagency agreement between law enforcement departments, probation agencies and the district attorney's office to handle all juvenile offenses consistently and uniformly.

The stated goal of the agreement is to "strengthen the concepts of accountability and thereby rehabilitation in the juvenile justice system by reversing the minor's expectation, confirmed by recent history, that the system will handle him or her repeatedly on an informal basis with minimal formal court action in response to misconduct . . . ."

The committee submitted a position paper to the State Juvenile Law Revision Commission regarding appropriate juvenile justice legislation and is currently developing guidelines for uniform case processing of child molestation cases.

San Joaquin County, California

In San Joaquin County, California, a deputy district attorney is assigned to both city and county School Attendance Review Boards (SARBs). These interagency groups are composed of representatives from schools, juvenile probation and welfare departments, law enforcement agencies, district attorney's office, parents, as well as private counseling organizations and mental health and public health agencies.

SARBs meet regularly to hear individual cases of truant students. They consider all the information available including reports from law enforcement, probation and welfare agencies regarding past records (e.g., delinquency, child abuse, etc.). Parents and students are involved in such hearings, and findings and recommendations are made to rectify each situation. Such findings and recommendations may involve referral to family counseling or simply a warning to parents and students that the truancy must stop.

The active participation of the district attorney's (D.A.) office on this board is crucial because it provides an enforcement element. Following SARB hearings, if problems are not resolved, the D.A.'s office can issue citations requiring parents and students to show reasons why they should not be charged

with violations of compulsory attendance laws. Often, these threats alone are sufficient to convince parents and students that the situation is serious and will not be ignored. If not, the next step is to actually file charges.

The decision as to whether to file criminal charges (Calif. Ed. Code, §48291) or noncriminal charges (Calif. Welf. & Inst. Code, §300) against the parent, or charges against the juvenile (Calif. Welf. & Inst. Code, §601), or both, is shaped by the information obtained in a SARB hearing. Usually, if the charges are against the juvenile, the case is first referred to the probation department. There, the staff of a counseling program, "New Directions," attempts to intervene and resolve the problem before filing. If that does not work, the probation department files formal charges against the youth.

The D.A.'s office then follows through by assisting schools or probation departments to usher the case through court. The result is an effective interagency solution to truancy and related delinquency problems.

While a SARB is specifically designed to address truancy (which can be closely correlated to a variety of delinquent acts), it also provides a forum for juvenile justice and education professionals to meet regularly and thereby establish effective working relationships on many subjects.

In each of the school safety situations discussed in this booklet, interagency cooperation is the key. Through interagency communication and collaboration, consistent priorities are set and effective policies and procedures developed.

Based upon the program descriptions, it is evident that the legal community can *and must* be active and effective in shaping a wide array of program strategies and practices aimed at reducing juvenile delinquency and promoting school safety.[19] These efforts range from instructional approaches such as law-related education and speakers bureaus at the level of primary prevention, to statutory enactments facilitating forceful prosecution of more serious juvenile offenders at the level of adjudication. Especially exciting are those steps currently being taken by many attorneys and judges, and some of their professional associations, to assume leadership roles in what for them have been non-traditional areas of involvement in the juvenile justice system, namely, prevention and diversion.

Endnotes

1. Founded in 1977, the National Alliance for Safe Schools assists school administrators and staff with programs for improving the ways in which they deal with disruptive behaviors. These misbehaviors - known to all school principals - vary from rowdy actions that disrupt classrooms, to crime and violence or the threat thereof, which cripples the overall learning environment of the school.

   The National Alliance provides this help through security-related technical

assistance, research into the characteristics of incidents in particular schools, and publications furnishing data and information to those concerned with the social environment of schools.

Membership of $15 per year in the National Alliance brings with it access to its 1800-source library (for special literature searches), receipt of the *Safe Schools Bulletin* (current trends and activity in the field of crime prevention in schools), and receipt of the *Safe Schools Digest* (a synthesis of key current publications).

To become a member, or to receive additional information, contact: National Alliance for Safe Schools, 501 North Interregional, Austin, Texas 78702, 512/396-8686, Robert Rubel, Director.

2. See Nicholson, "Pursuing School Safety in the 80's: An Opinion From the Attorney General's Office," *Thrust for Educational Leadership*, Association of California School Administrators, Burlingame, 26 (October, 1981); republished in Cuervo (ed.), *Toward Better and Safer Schools: A School Leader's Guide to Delinquency Prevention*, National School Boards Association, Alexandria, VA (1984). United States Attorney General Edwin Meese III and Secretary of Education William J. Bennett, in their first joint interview, outline the essentiality of institutionalized cooperation between law enforcement and education at all levels throughout the nation. See "Meese/Bennett Interview," *School Safety*, National School Safety Center, Spring 1985, 18-20.
3. The California School Safety Center published *Campus Strife: The Educator's Crime Prevention Quarterly*, which was circulated to more than 30,000 educators and law enforcers statewide as well as several school safety specialty handbooks, including (a) *Truancy Reduction: The Hooky Handbook;* (b) *School Security Handbook: Get a Handle on a Vandal;* (c) *Alternatives to Vandalism: Cooperation or Wreckreaction;* (d) *Child Abuse: The Educator's Responsibilities;* (e) *Crime Prevention Coloring Book;* and (f) *Law In the School.*
4. Contact: California Attorney General's Crime Prevention Center, 1515 K Street, Sacramento, California 95814, 916/324-7863; California State Department of Education's Office of School Climate, 721 Capitol Mall, Sacramento, California 95814, 916/323-0561.
5. *People ex rel. George Deukmejian, as Attorney General of the State of California, et al. v. Los Angeles Unified School District, et al.*, Los Angeles County Superior Court No. 323360; Deukmejian, *The Lawsuit to Restore Safety in the Schools*, California Department of Justice, Sacramento (1980).
6. Deputy Attorney General Robert E. Murphy, handled the case from its beginnings and has a breadth of knowledge on school safety which can be of great assistance to any attorney considering litigation in the field. Office of the Attorney General, State Building, San Francisco, Calif. 94102, 415/557-2544.
7. But see *ibid.*, 2 Civ. 64340, Second District, Fourth Division, California Court of Appeal (1983).
8. See California Constitution, Article I, Section 28(c); Sawyer, "The Right to Safe Schools: A Newly Recognized Inalienable Right," 14 *Pacific Law Journal* 1309 (1983); and Carrington and Nicholson, "The Victims' Movement: An Idea Whose Time Has Come," 11 *Pepperdine Law Review* 1, 7-8, 11-13 (Symposium, 1984).
9. See *Goss v. Lopez*, 419 U.S. 565 (1975); Horowitz and Davidson, *Legal Rights of Children*, Shephard's/McGraw-Hill, Colorado Springs, 524-532 (1984); Frels, Cooper, Bracewell and Patterson, *School Discipline Policies and Procedures: A Practical Guide*, National School Boards Association, Washington, D.C. (1984); *Discipline Manual*, National Education Association, Washington, D.C. (1984); Mayer and Butterworth, *Constructive Discipline: Building a Climate for Learning*, Office of the Los Angeles Superintendent of Schools (1984); *Spell v. Bible Baptist*

Church, Inc., 303 S.E.2d 156 (Ga., 1983); *Wilson v. Gollinsville Conn. Unit School*, 451 N.E.2d 939 (Ill., 1983); Vacca and Hudgins, *Liability of School Officials and Administrators for Civil Rights Torts*, The Michie Company, Charlottesville (1982); Furtwengler and Konnert, *Improving School Discipline*, Allyn and Bacon, Inc., Boston (1982); Canter and Canter, *Assertive Discipline: A Take Charge Approach for Today's Educator*, Canter and Associates, Los Angeles (1980).

10. See *Enright v. Board of School Directors of the City of Milwaukee*, 346 N.W.2d 771 (Wis., 1984); *Rodriquez v. Inglewood Unified School District*, 152 Cal.App.3d 440 (1984); *Miller v. New York*, 478 N.Y.S.2d 829 (1984); *Peterson v. S.F. Community College District*, (1984), 36 Cal.3d 799; 685 P.2d 1193; 205 Cal.Rptr. 842; *Auerbach v. Council Rock School Dist.*, 459 A.2d 1376 (Pa., 1983); *Carson v. Orleans Parish Bd.*, 432 So. 2d 956 (La. Ct. App., 1983); *Mullins v. Pine Manor College*, 449 N.E.2d 331 (Mass., 1983); *Alma W. v. Oakland Unified School District*, 123 Cal.App.3d 133 (1981); and *Ferraro v. Board of Education*, 212 N.Y.S.2d 615 (1961).
11. See Rogister, Majestic and Williams, *Search and Seizure in the Schools*, National School Boards Association, Washington, D.C. (1984); a case with potentially great impact on this subject is pending before the United States Supreme Court in *New Jersey v. T.L.O.*, No. 83-712; see also, 463 A.2d 934 (N.J., 1983); the federal Ninth Circuit Court of Appeal recently ruled on a pertinent civil matter in an Oregon case entitled *Bilbrey v. Garland Brown*, Circuit Court of Appeals No. 81-3008 (8/2/84).
12. See Van Duizend, Mlyniec and Foster (rptrs.), *Standards for the Administration of Juvenile Justice*, U.S. Government Printing Office, Washington, D.C. (1980); and Lowe and Watters, *Legal Research for Educators*, Phi Delta Kappa, Bloomington, Ind. (1984).
13. Contact: Los Angeles County Office of Education, Division of Evaluation, Attendance and Pupil Services, 9300 East Imperial Highway, Downey, Calif. 90242-2890, 213/922-6231.
14. Moderated by Dean William Adrian of the Graduate School of Education and Psychology, Pepperdine University; panelists were Frank Carrington, Esq., of Virginia, a nationally respected crime victims' rights activist; Glenn Fait, Dean of Administration, McGeorge School of Law; Albert Howenstein, Executive Director of the Governor's Office of Criminal Justice Planning; and George Nicholson, Director and Chief Counsel of the National School Safety Center.
15. See Rodriguez, "Has Student Rights Litigation Demoralized Educators?" *Thrust for Educational Leadership*, Association of California School Administrators, Burlingame, 5 (Jan./Feb. 1981); Duke, Donmoyer and Farman, "Emerging Legal Issues Related to Classroom Management," 8 *Journal of Law and Education* 495 (1979); and Deukmejian, *Law in the School*, California Department of Justice, Sacramento, 1980; finally, see *Final Report: The President's Task Force on Victims of Crime*, U.S. Government Printing Office, Washington, D.C., December 1982.
16. Moderated by George Nicholson, Director and Chief Counsel, National School Safety Center; panelists were: Art Bell, author of *Bell's Compendium*, nationally acclaimed expert on Fourth Amendment issues; Marian LaFollette, California State Assemblywoman from Woodland Hills; Frank Carrington, Director of VALOR (Victims Assistance Legal Organization); The Honorable H. Randolph Moore, Presiding Juvenile Court Judge, Los Angeles County; James Rapp, Author of *Education Law*, (Matthew-Bender); and Glenn Fait, Dean of Administration, McGeorge School of Law. California Supreme Court Justice Stanley Mosk delivered a major address at the same conference. See Mosk, "School Safety and

the Law," *School Safety*, National School Safety Center, Spring 1985, 4-8.

17. Law-related education resources: (1) Charlotte C. Anderson, American Bar Association, Youth Education for Citizenship Committee, 750 N. Lake Shore Drive, Chicago, IL 60611, 312/988-5725; (2) Charles N. Quigley, Center for Civic Education/Law in a Free Society, 5115 Douglas Fir Road, Suite 1, Calabasas, CA 91302, 818/340-9320; (3) Vivian Monroe and Todd Clark, Constitutional Rights Foundation, 1510 Cotner Avenue, Los Angeles, CA 90025, 213/473-5091; and (4) Lee Arbetman, National Institute for Citizen Education in the Law, 605 G. Street, N.W., Washington, D.C. 20001, 202/624-8217.
18. Contact founder Thomas W. Evans of Mudge Rose Guthrie Alexander & Ferdon, 180 Maiden Lane, New York, New York 10038, 212/510-7000.
19. Among the most fruitful school law resources are: (1) Professor Clifford P. Hooker, Chairman, Editorial Advisory Committee, West's *Education Law Reporter*, University of Minnesota, 275 Peik Hall, 159 Pillsbury Drive S.E., Minneapolis, Minnesota 55455, 612/373-5568; (2) Mr. Thomas N. Jones, executive director, National Organization on Legal Problems in Education (NOLPE), Suite 223, 3601 Southwest 29th, Topeka, Kansas 66614, 913/273-3550; (3) Gwendolyn Gregory, Deputy Legal Counsel, National School Boards Association's Council of School Lawyers, 1680 Duke Street, Alexandria, VA 22314; (4) James A. Rapp, Esq., *Education Law*, 3 vol., Matthew Bender, New York (1984); and (5) *Journal of Law & Education*, published quarterly by the Jefferson Law Book Co., 646 Main Street, Cincinnati, Ohio 45202.

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